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REPORTS

OF

Cases in Law and Equity

DETERMINED IN THE

S U P R E M E C O U R T

OF THE

STATE OF NEW YORK.

BY OLIVER L. BARBOUR, LL. D.

VOL. XXXIV.

ALBANY:

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JUSTICES OF THE SUPREME COURT,

DURING THE YEAR 1861.

FIRST JUDICIAL DISTRICT.

- CLASS 1. THOMAS W. CLERKE.*
" 2. JOSIAH SUTHERLAND.
" 3. DANIEL P. INGRAHAM.
" 4. WILLIAM H. LEONARD.
" 5. GEORGE G. BARNARD.

SECOND JUDICIAL DISTRICT.

- " 1. JOHN A. LOTT.†
" 2. JAMES EMOTT.*
" 3. JOHN W. BROWN.
" 4. WILLIAM W. SCRUGHAM.

THIRD JUDICIAL DISTRICT.

- " 1. WILLIAM B. WRIGHT.*
" 2. GEORGE GOULD.
" 3. HENRY HOGEBOOM.
" 4. RUFUS W. PECKHAM.

FOURTH JUDICIAL DISTRICT.

- " 1. AMAZIAH B. JAMES.†
" 2. ENOCH H. ROSEKRANS.*
" 3. PLATT POTTER.
" 4. AUGUSTUS BOCKES.

JUSTICES OF THE SUPREME COURT.

FIFTH JUDICIAL DISTRICT.

- CLASS 1. WILLIAM J. BACON.*
 " 2. WILLIAM F. ALLEN.
 " 3. JOSEPH MULLIN.
 " 4. LE ROY MORGAN.

SIXTH JUDICIAL DISTRICT.

- " 1. CHARLES MASON.†
 " 2. RANSOM BALCOM.*
 " 3. WILLIAM W. CAMPBELL.
 " 4. JOHN M. PARKER.

SEVENTH JUDICIAL DISTRICT.

- " 1. HENRY WELLES.*
 " 2. ERASMUS DARWIN SMITH.
 " 3. THOMAS A. JOHNSON.
 " 4. ADDISON T. KNOX.

EIGHTH JUDICIAL DISTRICT.

- " " JAMES G. HOYT.†
 " 2. RICHARD P. MARVIN.*
 " 3. NOAH DAVIS, JUN.
 " 4. MARTIN GROVER.

CHARLES G. MYERS, *Attorney General.*

* Presiding Justice.

† Sitting in the Court of Appeals.

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CASES
IN
Law and Equity
IN THE
SUPREME COURT
OF THE
STATE OF NEW YORK.

VAN HOOZER *vs.* CORY.

In February, 1858, V. leased to S. a dairy farm, with the cows and all the fixtures and dairy implements thereon, for the term of two years from the 15th of March then next, at the annual rent of \$300, to be paid on the 1st of December. The lease contained this clause: "And it is further agreed that the said \$300 shall be paid by the party of the second part, as much earlier than the 1st day of December as the products of said farm can be marketed to advantage. And it is further covenanted and agreed between the parties that all the produce and products of the farm and cows that shall be raised and made each year shall be and remain to be the property of the party of the first part, until the sum of \$300, rent of each of said years above mentioned shall be paid and said repairs of said year shall have been made, and until all the conditions of this lease, of said year, shall have been fulfilled. And said S. shall have no right to sell or dispose of any of such products without the consent of said V., who shall be present to receive the money, until the above rent shall have been fully paid for said year, and all other stipulations and conditions herein contained, fulfilled. Said S. is to have the right to milk and butter for the use of his own family, and no more, till said rent is paid and all other stipulations and conditions for said year fulfilled."

Held that the expected products of the dairy and the farm were the subjects of a grant, as being potentially in existence, and within the power of the

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lessee, at the date of the lease; and that the grant to V. was absolute and perfect when made, vesting the property in the grantee the moment it should come into existence.

Held also, that the transfer of the products and crops to V. was absolute, and attached to such products and crops as they came into existence, and V.'s title could only be divested by the payment of the rent. That such transfer gave to V. the right of immediate possession, not only as against the lessee, but against all claiming through or under him.

Held further, that taking the whole contract together, it was evidently the design that the property in the produce of the farm should be in V. and not in S., until the payment of the rent; and that the contract, as thus interpreted, was not illegal or unreasonable, nor within the rule which prohibits the selling or mortgaging of property not in existence, or not owned. at the time, by the vendor or mortgagor.

ACTION of trespass, for taking and carrying away a quantity of cheese, the property of the plaintiff. The defendant justified as a constable, under a judgment and execution against one Nicholas Smith. The cause was tried before MULLIN, J. without a jury, at the Jefferson circuit, in March, 1860, and upon the trial it appeared that the plaintiff, in February, 1858, leased to the debtor, Nicholas Smith, a dairy farm in the county of Jefferson, with the cows and all the fixtures and dairy implements thereon, for the term of two years from the 15th day of March of that year, at the annual rent of \$300, to be paid on the first day of December in each year. The lease, in addition to the usual provisions, contained the following clause: "And it is further agreed that the said \$300 shall be paid by the party of the second part as much earlier or sooner than the first day of December of each year as the products of said farm can be marketed to advantage; and it is further covenanted and agreed between the parties that all the produce and products of the farm and cows that shall be raised and made, each year, shall be and remain to be the property of the party of the first part until the sum of \$300, rent of each of said years above mentioned, shall be paid, and said repairs of said year shall have been made, and until all the conditions of this lease of said year shall have been ful-

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filled. And said Smith shall have no right to sell or dispose of any of such products without the consent of said Van Hoozer, who shall be present to receive the money when sold, until the above mentioned rent shall have been fully paid for said year, and all other stipulations and conditions herein contained fulfilled. Said Smith is to have the right to milk and butter for the use of his own family and no more, till said rent is paid and all other stipulations and conditions for said year fulfilled."

The rent for 1858 was paid, and the cheese in question was a part of the products of 1859, and was taken by the defendant in August, 1859, he having notice of the claim of the plaintiff. The judge at the trial held that the plaintiff, at the time of the levy and sale by the defendant, was the owner of the cheese and entitled to the possession thereof, and gave judgment for the plaintiff for its value, from which the defendant appealed.

F. Kernan, for the appellant.

S. H. Ainsworth, for the respondent.

By the Court, ALLEN, J. The plaintiff asserts a legal claim to the property, and must succeed, if at all, upon the establishment of a legal title to it. He cannot recover upon any equity as between himself and his lessee, and it is not necessary to consider their respective rights, legal or equitable, as against each other. There is no claim made that the transaction between the plaintiff and Smith was fraudulent as against the creditors of the latter; nor was the justification of the defendant put upon the ground that the interest or title of the plaintiff was that of mortgagee for a debt not due, with a right of possession for a definite time in the mortgagor, which was the subject of levy and sale upon execution against him. The only question made at the circuit or presented by the bill of exceptions, is whether the plaintiff had title to the property in dispute. That property must have an actual

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or potential existence, in order to be the subject of a sale or mortgage, is so well settled as to have become elementary ; as is also the proposition that at the time of the sale or mortgage the vendor or mortgagor must have a present disposable interest in it. A thing may be the subject of a sale, although not in actual existence, if it has a potential or possible existence, as the product or increase of that which is in existence, and the right to it when it shall come into actual existence is a present vested right. If one, being a parson, give to another all the wool he shall have for tithes the next year, this is a good grant, although none may arise ; for the tithes are potentially in the parson. Trees, grass and corn growing and standing upon the ground, fruit upon the trees, or wool upon the sheep's back are grantable, provided they are potentially in the grantor. So growing hops and growing turnips are grantable. So one may grant all the wool of his sheep for seven years, but not of the sheep which he shall thereafter purchase. (*Shep. Touch.* 241, 2. *Waddington v. Bristow*, 2 *Bos. & Pull.* 452. *Emmerson v. Heelis*, 2 *Taunt.* 38.) A parson of a church may grant his tithes for years, and yet they are not in him, except potentially. (*Perk.* § 90.) In *Beaumont v. Crane*, (14 *Mass. Rep.* 400,) the court held that the plaintiff having advanced money to a third person to enable him to construct certain machines, under an agreement that he should have a share in the machines equal to his advances, became thereby a tenant in common with the constructor, and acquired an interest in the property without any manual delivery. If A. leases land to B. for years and grants that he shall have the actual fruit of the soil, as grass which revives yearly, which shall be on the land at the end of the term, the grant is good and passes the property to the grantee. (*Hob.* 132. 2 *Roll. Abr.* 48.) The same principle is adjudged applicable to the annual crops, the fruit of the annual labor of the lessee ; as if a lessor covenants that it shall be lawful for the lessee at the expiration of the lease to carry away the corn growing on the premises, although by

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possibility there may be no corn growing at the expiration of the lease, yet the grant is good, for the grantor had such a power in him, and the property shall pass as soon as the corn is extant. (*Hob. 132. Grantham v. Haley, Bacon's Abr. Grants, D. 3.*) So a valid sale may be made of the wine that a vineyard is expected to produce, or the grain that a field is expected to grow, or the milk that a cow may yield during the coming year, or the future young cow of a female animal owned by the vendor. (*McCarty v. Blevins, 5 Yerger, 195. 1 Pars. on Cont. 438, note h.*) The grant in this case was of the cheese expected to be made from the cows, and the products expected to be raised upon the premises then demised to the grantor; and the products of the dairy and farm were as properly the subjects of a grant as potentially in existence and within the power of the grantor, as the corn that should be growing at the expiration of the term in *Grantham v. Haley*, the wine expected to be made from the fruit of the vineyard to be grown, or the grain to be thereafter grown, or the future young of the animal. Here the grant is absolute and perfect when made, vesting the property in the plaintiff, the grantee, the moment it should come into existence, or in the language of the books, "as soon as it was extant." The thing granted had a potential existence, and the hopes or expectations of means founded on a right in esse was the object of sale. (*2 Kent's Com. 468, note a.*) *Wood v. Lester*, (*29 Barb. 145,*) is very analogous to this, and upheld the judgment given at the circuit. A mortgage was there given to secure the payment of the purchase money of a farm, and it provided that the mortgagor should deliver all the wood he might cut upon the mortgaged premises, upon the line of the New York Central Rail Road, at the places designated by the company; that the mortgagee should have a lien upon such wood for the purchase money until the same should be paid; and a similar lien upon the crops &c.; that the mortgagee should have the right to demand and receive from the rail road company three dollars for every cord of wood so deliv-

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ered; and that the mortgagor should from time to time, on the demand of the mortgagee, execute and deliver to him such chattel mortgage or mortgages as might be necessary to perfect and perpetuate the lien until the purchase money should be fully paid in, &c.; and it was held that this was a valid agreement, and although it could not take effect until the wood should be cut and severed from the freehold, yet it attached instantly as the wood became personal property, and that it should be enforced against the mortgagor and all persons claiming from or through him with notice of the lien thus created. It is true it was enforced as an equitable lien on the foreclosure of the mortgage, but it was established as a lien created by the contract and agreement of the parties, and the property then only potentially in existence as personal property was treated as the proper subject of a contract which gave the plaintiff a vested interest in it as soon as it came into existence. The agreement in the case before us is clearly distinguishable from that in either of the cases cited from the Massachusetts Reports, (*Butterfield v. Baker*, 5 Pick. 522; *Munsell v. Carew*, 2 Cushing, 50.) In neither case was the transfer absolute. In the case last cited the agreement was that in case of default in the payment of the rent the lessor was to have all the crops &c. to dispose of as he saw fit. The property had been taken before default in the payment of the rent. Wilde, J. very properly says, "At that time the lessee had neither the property, nor the possession, nor the right of possession in the produce taken; and if he afterwards had acquired the right of property that would not avail him in this action." He held the clause in the lease to be rather an executory contract or license to dispose of the crops and produce for the payment of the rent, and not a sale of the whole produce. In *Butterfield v. Baker* the agreement was that the crops should be held for the rent of the farm, and that the lessor might enter to take the same for rent that should be in arrear, &c.; and it was held that it did not amount to an absolute sale or mortgage, but a contract to be completed

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by a delivery in order to affect creditors and bona fide purchasers. In that case no rent was due at the time of the seizure by the defendant. In the case in hand the products and crops were to be and remain to be the property of the plaintiff until the rent should be paid. The transfer was absolute, and attached to the crops and products of the dairy as they came into existence, and could only be divested by the payment of the rent for the current year. This transfer gave the plaintiff the right of immediate possession, not only against the lessee but against all claiming through or under him. (*See also Lewis v. Lyman*, 22 Pick. 437.) Taking the whole contract together, it was evidently the design that the property in the products of the farm should be in the plaintiff, and not in the lessee, until the payment of the rent. The contract as thus interpreted is not illegal or unreasonable. In the view taken of the contract, and of the character of the property affected by it, and the power of the lessor to give title to it, the case is not within the rule which prohibits the selling or mortgaging property not in existence or not owned at the time by the vendor or mortgagor. *Milliman v. Neher*, (20 Barb. 37,) was more like the Massachusetts cases cited, and Bockes, J. says, "Besides, I am of the opinion that the terms used, that the plaintiff should have a *lien on the crops as security*, do not import a sale or mortgage. A mortgage is a conditional sale. This clause of the lease contains no words of sale, nor any from which a sale can be implied." In *Cayun v. Eutts*, (10 Exch. 298,) it was decided that a power to seize and take possession of crops thereafter to be grown, as security for a debt, did not vest a title to the property until an actual seizin and possession under the power;—also clearly distinguishable from this case. I am of the opinion that the judgment should be affirmed.

MULLIN, J. concurred.

MORGAN, J. dissented.

Judgment affirmed.

ST. PAUL'S CHURCH IN SYRACUSE *vs.* FORD and POMEROY.

The owner of a pew in a church is not liable *in personam*, in respect to an assessment thereon, unless there be some special ground from which to infer a contract and promise to pay.

The interest in a pew, created by a lease in perpetuity, is an interest or estate in realty, and the lessees or pew owners take the title of their pews as real property with all its incidents.

Where a lease of a pew is executed to several persons they are tenants in common of the pew, under their lease, having several and distinct freeholds, and each being solely and severally seised of his share.

Neither of them can bind the other by an agreement in respect to the common property, but any one can charge his separate and several estate, or can convey it, or mortgage it, or become personally liable upon an undertaking respecting it.

Where several persons, who were tenants in common of a pew, signed a paper by which they covenanted and agreed to and with the church that a former appraisal of the value of such pew should be superseded, and that the wardens and vestry, &c. might make a reappraisal of the value of said pew to any sum not exceeding \$450, and that the pew should be subject to the same annual tax or assessment that it was then liable to; in pursuance of which stipulation the pew was reappraised at \$275; *Held*, in an action against all the owners of the pew, to collect an assessment made upon such reappraisal, that neither of the signers of the paper became jointly bound with, or as surety for the others, nor did any one of them charge his share of the pew for another owner's portion of the tax or assessment; and that consequently a joint action could not be maintained against all the pew owners.

ACTION to recover against the defendants, jointly, \$55, as pew rent on an assessment upon pew No. 18 in the plaintiffs' church, valued on making the assessment at \$275. The action was tried before ALLEN, J. and a jury, at the Onondaga circuit, in June 1860. On the trial the plaintiff gave evidence of its incorporation, and proved a lease of pew No. 18 to the defendants, dated June 7th, 1852, in consideration of \$100 and subject to an annual assessment of not exceeding twelve per cent upon the amount of such consideration, for the current expenses of the parish, which assessment the defendants covenanted to pay. In November, 1856, the defendants severally and at different times, with other pewholders in the church, signed an agreement as follows:

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"For a valuable consideration to me in hand paid by St. Paul's Church in Syracuse, the receipt whereof is hereby acknowledged, I do hereby covenant and agree to and with said St. Paul's Church in Syracuse, that the former assessment of the value of my pew or pews therein be superseded, and that the wardens and vestry of said church, or any committee by them appointed for that purpose, may make a reappraisal of the value of my said pew or pews herein, to any sum not exceeding \$450 on each pew as shall be thought just and equitable, for the purpose of increasing in a just and equitable manner the annual income of said church, the present income being entirely inadequate to the wants thereof, and that said pew or pews be subject to the same annual tax or assessment that the same now is or are for the purposes aforesaid." The pew of the defendants was reappraised at \$275 in pursuance of this stipulation, and the amount claimed in this action was the assessment upon this reappraisal. Upon the trial the objection was taken by the defendants that if liable at all, their liability was several and not joint, and that a joint action could not be maintained against them, and the point was held to be well taken, and the plaintiff was nonsuited; to which the plaintiff excepted, and upon a bill of exceptions, pursuant to leave given, now moved for a new trial.

R. Rayner, for the plaintiff.

B. Davis Noxon, for the defendants.

By the Court, ALLEN, J. The action is brought upon the instrument or agreement of November, 1856, and not upon the original lease and the covenant contained in it. No assessment or tax has been made upon the pew at the valuation in the lease, but all the proceedings for the assessment, as well as for its collection, have been under the supplemental agreement. A very serious question arises whether the de-

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defendants are either severally or jointly liable personally for any assessment upon the reappraisal of the pew under the agreement of 1856. In the assessment provided for by the lease they were personally liable upon their express covenant to pay. But the agreement of 1856 contains no covenant or promise of any kind. It is a mutual consent to give up the old appraisal, and that a new appraisal may be made, and that the pews be subject to an annual tax or assessment upon the amount at which they should be appraised. The signers do not agree that they will be subject to such assessment in respect to the pews, or promise to pay any such assessment. Neither is it an alteration of the terms of the lease or an agreement to reform the lease or engraft the new appraisal upon it. It may well be that the pew holders may be willing to subject their pews to the enhanced lien when they would not be willing to bind themselves and their heirs perpetually to its payment. A pew owner is not liable *in personam* unless there be some special ground from which to infer a contract or promise to pay. (*First Pres. Congregation in Hebron v. Quackenbush*, 10 John. 217.) The express covenant in the lease, the absence of it in the substituted agreement, and the special provision for charging the pews is evidence entitled to some consideration that the defendants did not intend to undertake personally for the payment of the assessment. But the question made at the circuit and presented by the bill of exceptions is as to the joint liability of the defendants, if liable at all. The interest in a pew created by a lease in perpetuity, like that to the defendants, is an interest or estate in realty, and the lessees or pew owners take title of their pews as real property, with all its incidents. (*Baptist Church in Ithaca v. Bigelow*, 16 Wend. 28. *Shaw v. Beveridge*, 3 Hill, 26. *Vielie v. Osgood*, 8 Barb. 130.) The defendants were tenants in common of the pew under their lease, and they had several and distinct freeholds. Each was solely and severally seised of his share. (4 *Kent's Com.* 367, 8.) Neither could encumber the estate of the other, or

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create any servitude or easement upon the common property without the consent of the other. (3 *id.* 436.) Neither could bind the other by an agreement in respect to the common property, but either could charge his separate and several estate, or could convey it or mortgage it, or become personally liable upon an undertaking respecting it. When the defendant Pomeroy signed the agreement of November, 1856, he charged his several estate or interest in the pew with the additional rate or assessment provided for, whether Ford became a party to it or not, and if any personal liability was created by signing the paper he bound himself only. The charge and liability was then several, and not joint. Pomeroy did not undertake to bind Ford, or charge his moiety of the pew. When Ford subsequently became a party to the agreement he undertook for himself and in respect to his moiety of the pew, but his liability and the charge upon his share of the common property, resulted from his individual and several undertaking. He did not become the surety of Pomeroy or charge his share of the pew for Pomeroy's portion of the tax or assessment. In no sense did any one of the signers of the paper become jointly bound with or sureties for the others. A joint liability cannot result from the ownership of a pew in common, any more than a joint liability of all the pew owners results from a quasi tenancy in common of the whole church. The nonsuit was right and the motion for a new trial must be denied

MULLIN, J. concurred.

MORGAN, J. dissented, on the ground that the fair import of the transaction is, that the new assessment upon the increased valuation of the pew, should be a charge upon the defendants *jointly*, as before. Both could separately agree to this.

New trial denied.

[ONONDAGA GENERAL TERM, October 2, 1860. *Allen, Mullin and Morgan, Justices.*]

BARRET vs. GRACIE.

When the facts upon which an order of arrest is granted are the same facts which constitute the cause of action, the order of arrest cannot be discharged; unless the defendant clearly makes out such a case as would call on the judge presiding at the trial to either nonsuit the plaintiff, or direct a verdict for the defendant.

The decision in *Frost v. McCarger*, (14 How. Pr. 131,) approved. The cases of *Union Bank v. Mott*, (6 Ab. 315,) *Hernandez v. Carnobeli*, (4 Duer, 642,) and *Republic of Mexico v. Arrangois*, (11 How. Pr. Rep. 1,) commented on. If A. places an article in the hands of B. to sell, the proceeds over and above the compensation of B., to be paid to A., B. becomes vested with a fiduciary capacity, and in the event of his selling the article, receiving the proceeds, and neglecting to pay over, he is liable to arrest.

Nor is the principle different where a price is fixed, which the agent is directed to realize, net. A principal may limit his agent, as to price, without destroying the fiduciary character.

MOTION to discharge an order of arrest. The complaint alleges that the plaintiff, at divers times in the month of November, 1860, to wit, on the 6th, 9th and 12th days of said November, by his agents, delivered to the defendant, who was doing business in the city of New York as a broker, divers bills of exchange on parties in England, for the aggregate sum of £9600 sterling, upon an agreement made with the defendant, whereby he agreed to sell said bills of exchange at certain specified rates per cent over and above his commissions for selling, and to pay the amounts so received by him, on the receipt thereof, to Wilbur & Price, agents for the plaintiff. That the total sum at which said Gracie was authorized to sell said bills of exchange, over and above his commissions, was \$45,762.22. That said Gracie, prior to the 17th of November, 1860, sold all of said bills of exchange, and, on and prior to that date, received therefor the said sum of \$45,762.22. That said Gracie, on and prior to the 16th of November, 1860, of the said money so received by him, paid to the plaintiff's said agents the sum of \$33,873.33; but has failed to pay the balance of the money received by him for said bills, to wit, the sum of \$11,888.89, and has appropriated the same to his own use. That the defendant is

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indebted to the plaintiff in said sum of \$11,888.89, with interest from November 17, 1860, for said money so received by him belonging to the plaintiff. The judgment prayed for by the complaint is for the said sum of \$11,888.89 with interest from November 17, 1860, besides costs of action.

BARNARD, J. The dates of the delivery of these bills with the number thereof delivered on those dates, the aggregate amount thereof, the rate at which they were to be sold, and the sum which they would produce if sold at those rates as the same are alleged in the complaint, will appear by the following schedule.

Date.	No. of bills.	Aggr. amount.	Rate per cent.	Sum produced.
1860, Nov. 6	3	£2500	107 $\frac{3}{4}$	\$11,992 22
“ “ 9	6	4600	107 $\frac{1}{8}$	21,901 11
“ “ 12	4	2500	107	11,888 89
Total,				\$45,762 22
Payment,				33,873 33
Balance,				<u>\$11,888 89</u>

It will thus be perceived that the proceeds of the bills delivered on the 6th and 9th of November have been paid to the plaintiff, and that this action is in fact brought for the proceeds of the bills delivered on the 12th. Upon the complaint and an affidavit supporting the allegations contained in it, an order of arrest was obtained by the plaintiff and the defendant arrested thereunder.

It will be seen that the facts constituting the cause of action and those constituting the grounds for arrest are the same. The defendant now moves on his own affidavit to vacate the order of arrest. The plaintiff, to sustain the order, reads his own affidavit and those of his agents, Jeremiah Wilbur and Joseph W. Price. The defendant's affidavit does not contradict or vary the case made by the complaint, except in the following three particulars: 1st. The defendant

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swears that the various bills of exchange were sold to him by Wilbur & Price as their own property, at fixed prices, on a credit, and were not delivered to him as a broker to sell for the plaintiff, and to pay the proceeds of the sale over to the plaintiff or to Wilbur & Price, as agents for the plaintiff; and in this connection he sets out in his affidavit several instruments which he swears were given him by Wilbur & Price, and which he terms bills of sale of said bills of exchange. The following is a copy of that one of such instruments which refers to the bills of exchange delivered on the 12th of November, 1860 :

“ ROBT GRACIE Bought of WILBUR & PRICE,
1860. November 13. £2500 stg. on London, at 107.00,
\$11,888.89. Cash Saturday, 17th.”

2d. The defendant swears that he did not know the plaintiff in any of the transactions, but dealt with Wilbur & Price as principals. 3d. The defendant swears that he did not receive, on the sale of the bills of November 12th, the sum of \$11,888.89, but only the sum of \$11,666.67. It is alleged in the affidavits on behalf of the plaintiff, and not controverted by the defendant's affidavit, and therefore, for the purpose of this motion, must be taken as true, that the plaintiff was the owner of the bills of exchange, and was and is entitled to the proceeds thereof; that Messrs. Wilbur & Price were the agents of the plaintiff; that the defendant was a broker doing business in the city of New York; that Wilbur & Price delivered to the defendant the bills of exchange above mentioned, at the dates and at the rates specified; that the defendant has sold all of said bills of exchange, and has paid to Wilbur & Price the sum of \$33,873.33. That said sum of \$33,873.33 is the net amount, less commissions, which the sale of those bills of exchange that were delivered prior to November 12th, at the rates at which they were delivered to the defendant, would have produced. That the defendant has received, on the sale of the bills delivered on the 12th of

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November, the sum of \$11,666.67, which he has not paid over. The two questions in the case therefore are,

1st. Were the bills of exchange delivered to the defendant on an absolute sale thereof to him on credit; or were they delivered to him as a broker, in a fiduciary capacity, to be by him sold for the plaintiff, and when sold the proceeds of the sale to be paid over by him to the plaintiff or his agent?

2d. Was the transaction one between the defendant and the plaintiff through his agents, Wilbur & Price, or one between the defendant and Wilbur & Price?

On these two points the case stands thus: The defendant swears that the bills were delivered to him on an absolute sale thereof to him, and that he never knew or heard of the plaintiff in all of his transactions with Wilbur & Price, but that on the contrary all of his transactions with Wilbur & Price were with them as principals and not as agents. Messrs. Wilbur & Price both swear that the bills were delivered to the defendant in his capacity as broker, to sell the same at not less than a certain rate over and above his commissions, and to pay so much of the proceeds of the sales as should amount to said rates, to them as the agents of the plaintiff. They also swear that as to the bills delivered on the 12th of November they informed the defendant that the plaintiff was the owner of the bills, and that they could not permit him to sell them for less than 107 per cent, net, to his customers, and if he did not sell for that amount he must return the bills. It may be conceded that the defendant by his affidavits contradicts all these statements of Messrs. Wilbur & Price. The preponderance of the testimony, however, (there being two oaths to one,) is clearly in favor of the plaintiff, unless there are some facts and circumstances sustaining the defendant's affidavit so strongly as to outweigh the force of the two opposing oaths. The defendant's counsel insists that such a fact and circumstance is to be found in the form of the instruments called bills of sale. I will not inquire into

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the force of these instruments if entirely unexplained, because the plaintiff has tendered an explanation.

Both of the plaintiff's agents swear that the defendant and other brokers are not in the habit of disclosing the names of their customers, and that memoranda in the form of the bills of sale referred to in the defendant's affidavit are made for convenience, to fix the sum at which the bills of exchange are to be sold, and the name of the broker is inserted because the name of his principal is not known, and that it is a custom among agents doing business for non-resident principals, and among brokers who do not wish to disclose the names of their customers, to make out memoranda like the instruments called bills of sale set out in the defendant's affidavit, when it is well understood and known that they are acting as mere agents or brokers, and that such was the case in their (the plaintiff's agents) transactions with the defendant. Both of the plaintiff's agents also swear that they always fixed the price at which said defendant might sell the bills of exchange net over his commissions, and the defendant was allowed for his commissions all he obtained over the price so fixed on, and that the instruments set out in the defendant's affidavit and designated therein as bills of sale, were memoranda made merely to fix the amount at which the defendant might sell, and the defendant's name inserted because the defendant did not wish to disclose the names of his customers to the purchasers. When we take into view the clearly proven fact that Messrs. Wilbur & Price were not authorized by their principal (the plaintiff) to sell on credit, this explanation seems to be, for the purpose of this motion, a sufficiently reasonable and proper one, and these instruments, thus explained, do not add to the defendant's affidavit such force as to show clearly that the plaintiff has no cause of action. I use the term "for the purposes of this motion,"* for I do not intend on this application to dispose of the whole merits of the controversy. In my opinion, when the facts upon which the order of arrest is granted are the

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same facts which constitute the cause of action, the order of arrest cannot be discharged, unless the defendant clearly makes out such a case as would call on the judge presiding at the trial to either nonsuit the plaintiff or direct a verdict for the defendant; or in the words of Justice Marvin in the case of *Frost v. McCarger*, “the court should not in the class of cases we are considering, (that is, cases where the facts constituting the cause of action and authorizing the arrest are the same,) vacate the order of arrest, unless the facts show clearly that the plaintiff has no cause of action. If the plaintiffs raise a fair question for the jury, upon the merits of the action, the court should not interfere.” It is unnecessary for me here to give my reasons in full for this opinion, as they will be found in the well considered opinion of Justice Marvin in the case of *Frost and others v. McCarger*, (14 *How.* 131.) This point was neither distinctly presented, nor passed upon, in the cases of *Corwin v. Freeland*, (2 *Seld.* 565,) and of *The Union Bank v. Mott*, (6 *Abb.* 315;) and those cases cannot be considered authority on this point. Justice Marvin, in his opinion, comments on the case of *Corwin v. Freeland*, and shows that it has no application to the point now in question. He also reviews the cases of the *Republic of Mexico v. Arangois*, (11 *How.* 1,) and *Hernandez v. Carnobeli*, (4 *Duer*, 643,) decided at special term of the superior court by Justice Hoffman, and upon good and valid grounds dissents from that justice’s conclusions on this point. There is no reported special or general term decision of this district upon this question, and no reported general term decision of the other districts.

I am therefore at liberty to follow and adopt such special term decisions of any of the other districts as by the force and power of its reasoning commends itself to my judgment. This decision of Justice Marvin so commends itself, and is therefore adopted by me. In this case, the facts constituting the cause of action and authorizing the arrest, are the same, and therefore the affidavits on these points as to whether the

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bills were delivered to the defendant on an absolute sale thereof to him, or were delivered to him in his capacity as broker, to sell at not less than certain fixed prices and pay over the proceeds, and as to whether the defendant dealt with Messrs. Wilbur & Price as principals without knowing that they were acting as agents, or dealt with them as agents of the plaintiff, knowing them to be such agents, and knowing that the bills belonged to the plaintiff, raising fair questions for the jury upon the merits of the action, and it not appearing clearly that the plaintiff has no cause of action, the motion to discharge the order of arrest must be denied, unless either one or both of the following points is well taken. 1st. Assuming that the bills of exchange were delivered to the defendant as a broker, to sell at prices not less than certain sums net over his own commissions, and to pay the proceeds to the plaintiff, did this transaction vest the defendant with a fiduciary character? 2d. Is this action authorized by the plaintiff?

As to the first of these two propositions, I shall assume that this abstract proposition is well established law, viz: that if A. places an article in the hands of B. to sell, the proceeds, over and above the compensation of B. to be paid to A., then B. becomes vested with a fiduciary capacity, and in the event of his selling the article, receiving the proceeds and neglecting to pay over, is liable to arrest. In what respect does this case differ from the one put? Here, it is true, there is a price fixed which the defendant was directed to realize, net. A man can surely limit his agent as to price without destroying the fiduciary character. It is not an essential to the fiduciary character that the agent should be vested with absolute discretionary power as to the price at which he should sell, nor that he should be paid for his services according to a customary rate.

In *Holbrook v. Homer*, (6 How. 86,) it was held that an auctioneer who receives goods for sale, under an agreement that he is to receive all over a certain amount of the proceeds

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for his compensation, is liable to arrest for the non-payment of the proceeds. The fact then that the plaintiff's agents fixed the price at which the defendant might sell, and allowed him to retain all above that price for his commissions, does not destroy the otherwise fiduciary character of the defendant. The defendant paying by his own check is urged as another consideration. I am not inclined, however, to hold that the fiduciary relation can be destroyed by reason of the agent depositing the money he receives and paying it over by his check drawn thereon, instead of paying over the identical money or checks which he receives.

This first of the two propositions is not well taken.

As to the second of the two propositions, it is sufficient to say that the plaintiff appears by officers of this court, and that he has made an affidavit to support the order of arrest.

This proposition is not well taken.

In my views above expressed I do not intend to indicate what would be my decision in case the action was submitted to me as to a jury to pass upon. But I merely hold that the defendant has not made out so clear a case as to entitle him to a discharge of the order of arrest. Upon a trial of the cause, the jury passing upon the merits having greater opportunities for testing the truth, will, untrammelled by this decision, dispose of all the issues in this action, with which disposition the order of arrest will either stand or fall.

Motion denied, with \$10 costs.

[NEW YORK SPECIAL TERM, January 7, 1861. *Barnard*, Justice.]

VAN ALSTYNE *vs.* THE PRESIDENT, DIRECTORS &c. OF
THE INDIANA, PITTSBURGH AND CLEVELAND RAIL ROAD
COMPANY.

An agreement was entered into between the parties, by which the plaintiff was to work for the defendants for a year, commencing January 1, 1857, at \$75 per month. On the 15th of April, 1857, the plaintiff was paid in full to that day, and was, at his own request, and with the consent of the defendants, discharged from their employment. On the 1st of September, 1857, he tendered his services to the defendants, and repeatedly did so, until the end of the year 1857. In November, 1857, he sued the defendants for two months' wages, viz, for *September* and *October*, 1857. The defendants putting in no answer, judgment was taken against them by default. The present action was brought, upon the same contract, to recover wages for the months of *November*, and *December*, 1857. *Held* that the defendants were not estopped by the record of the recovery in the former action, from showing that the agreement between the parties had been *vacated* by mutual consent.

APPEAL from a judgment entered upon the report of a referee. The complaint alleges that the parties made an agreement, whereby the plaintiff was to work for the defendants for a year, commencing January 1st, 1857, and the defendants were to pay the plaintiff \$75 for each and every month therefor; that the plaintiff had performed his part of the contract, and had tendered his services for the months of November and December, 1857, which the defendants rejected; and that there is \$150 due him from the defendants. The answer denies that the plaintiff worked for the defendants during said months of November and December, and puts in issue the alleged tender by the plaintiff of his services for the two months. The answer also sets up as a defense, that on the 15th of April, both parties entered into an agreement with each other, whereby the said agreement for a year was terminated, and the employment of the defendant ceased.

The action was referred to the Hon. William Mitchell, and tried before him. The referee found that the plaintiff was employed by the defendants for a year, commencing the 1st

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of January, 1857, at \$75 a month, payable monthly; that he continued in their employment until the 15th of April, 1857, when he was paid in full to that day, and was at his own request and with the consent of the defendants, discharged from their employment, and went into the employment of another company; in whose employment he continued until September 1st, 1857; that on the last mentioned day, he tendered his services to the defendants, and tendered the same almost daily from that time to the end of the year 1857. The referee also found, as matter of fact, that the plaintiff sued the defendants, in November, 1857, on a complaint similar to the complaint in this action, for two months' wages, viz. for September and October, 1857; that the defendants putting in no answer, judgment was taken against them by default, and the amount of the judgment levied on execution.

The referee found, as matter of law, that the defendants were not estopped from showing in this action that the agreement for a year was vacated by mutual consent; that under the facts proved in this case, it was so vacated, and that the defendants were entitled to judgment.

H. Sacia, for the appellant.

L. Fairbanks, jun. for the respondents.

By the Court, SUTHERLAND, J. There was conflicting testimony on the question of fact, whether the agreement for a year was vacated by mutual consent. The referee found that it was, and that finding cannot be questioned on this appeal.

The other question is, were the defendants estopped by the record of the recovery against them in the former action, which was introduced in evidence on the trial, from showing, in this action, that the agreement for a year had been so vacated? The referee held as matter of law, that they were not. This was clearly right.

This action was not brought for the *same cause* as the

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former one. The alleged cause of action in this suit was the non-payment of the stipulated wages for the months of *November* and *December*; in the former action, the non-payment of the stipulated wages for the months of *September* and *October*. The causes of action in both suits were founded upon the same agreement, but were not the same.

The defendants did not appear or answer in the former action, and of course did not set up the matter as to the agreement having been vacated by mutual consent, in that action, by way of defense; and that matter could not have been tried or passed upon in that action. Had the defendants appeared in the former action and put in a general denial, without setting up the matter as to the agreement having been vacated by mutual consent, by way of defense, it would not have been necessary for the plaintiff to prove that the agreement had not been rescinded or vacated, in order to recover in that action; it would not have been necessary for the plaintiff to go out of his case and prove a negative.

The allegation, in the complaint in the former action, that the defendants had refused to pay the plaintiff for the months of September and October, or had rejected his services when tendered, "*without any legal excuse*," does not affect the question. Surely it would not have been necessary for the plaintiff to show whether the defendants had any excuse, or to raise the question whether they had any excuse.

The counsel for the plaintiff substantially takes the position, because the defendants chose, voluntarily and without being under any legal obligation to do so, to pay the plaintiff for the months of September and October, that therefore they are bound to pay him for November and December, although they now insist upon their legal rights.

In my opinion the cases cited by the counsel for the plaintiff have no application to the point in question; and the judgment should be affirmed with costs.

NEW YORK GENERAL TERM, February 4, 1861. *Clerke, Allen and Sutherland, Justices.*]

KNAUTH and KUHNE *vs.* BASSETT and others.

Although the law is now settled, by the decision of the court of appeals in *Wilson v. Robertson*, (21 N. Y. Rep. 587,) that the appropriation, by an insolvent firm, of partnership property to the payment of the individual debts of one of the partners, is fraudulent and renders the assignment void, as to creditors of the firm; yet an assignment which purports to be an assignment of all individual as well as of all partnership property, is not fraudulent and void on its face, where there is nothing appearing thereon to show that all the partners may not have had individual property, when the assignment was made, more than sufficient to pay their individual debts preferred by the assignment.

If in fact the assignment includes sufficient individual property of each partner to pay his individual debts directed to be paid by the assignee, such a direction will not render the assignment void.

It is, under such circumstances, for the assignors and their assignee to show, affirmatively and satisfactorily, that the individual property of each partner was sufficient to pay his preferred individual debts.

If that fact is not satisfactorily shown, the assignment will be held to be fraudulent and void, as against judgment and execution creditors of the assignors.

Persons not made parties to a former action are not barred or estopped from raising, in a subsequent action, questions not raised or passed upon in the former.

A judgment creditor is not obliged to wait until the expiration of the sixty days within which an execution must be returned, before commencing an action to set aside an assignment executed by the judgment debtor. He may commence such action as soon as the execution issued upon his judgment has been actually *returned*.

Such an action is brought in time, if commenced while the assignee has yet in his hands, unappropriated, moneys belonging to the trust, which it is the object of the action to reach.

THIS action was brought by the plaintiffs, as judgment creditors of Bassett & Aborn, formerly copartners in business, to set aside an assignment executed and delivered by them to the defendant Thomae, on the 15th day of August, 1854. The complaint alleged the indebtedness of Bassett & Aborn to the plaintiffs, and their recovery of judgment thereon, on the 2d of January, 1858, for \$3326.13; that executions were duly issued on such judgments, and have been severally duly returned unsatisfied; that on the 15th day of August, 1854, Bassett & Aborn, being then insolvent and unable to

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pay the debts of the firm either out of their copartnership effects or their individual property, executed and delivered to the defendant Thomae the assignment, which is set out in *hæc verba*. This assignment was in trust to pay in full—first, the debts described in schedule A.; second, to pay in full the debts described in schedule B.; and lastly, to pay all other unpaid debts. Schedule A. has in it these words: “Elizabeth A. Havens of Florida, for money lent to R. W. Aborn, \$100; Mary E. Tyler, of Rhode Island, for money rec’d by R. W. A. for her use, besides interest and upwards, \$60.” Schedule R. contains these words: “Isaac H. Bassett’s note to Mary E. Chamberlain, besides interest, \$900. Isaac H. Bassett’s note to Lydia F. Arnold, about, besides interest, \$200.” The complaint further alleged that this assignment was made to hinder, delay and defraud creditors, and that it was void upon its face, among other reasons, “because it appropriates the interest of the said Aborn in the said copartnership property, and his individual property, to the payment of the individual indebtedness of the said Isaac H. Bassett, and because it appropriates the interest of the said Isaac H. Bassett in the said copartnership property, and his individual property, to the payment of the individual indebtedness of the said Aborn; that said individual indebtedness of the said Bassett & Aborn, and of each of them, was contracted long prior to the 21st day of December, 1853, when their said copartnership was formed;” and that the assignee had in his hands funds sufficient to pay the plaintiffs’ debt; and prayed that the assignment might be adjudged fraudulent and void, and that the assignee might be decreed to pay the plaintiffs’ debt out of the assigned estate. The defendant Thomae answered separately, that he had paid all the preferred creditors mentioned in schedule A. except Horatio Bassett; that he had no knowledge or belief as to the allegations of fraud in the complaint; that he heretofore commenced an action against Horatio Bassett, praying for a construction of so much of the assignment as related to Horatio

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Bassett, in which the court adjudged that the said Horatio Bassett was a preferred creditor, and entitled to be paid in common with other creditors of the same class; that an account was ordered which had been taken, by which it appeared that he, Thomae, had in his hands, as such assignee, \$3246.30; and that a decree was entered in said action directing Thomae to pay such balance to Horatio Bassett, as a preferred creditor. Isaac H. Bassett answered separately, and denied the fraud; insisted upon his legal right to make the assignment; denied that the assignment appropriated his individual and copartnership property, as alleged in the complaint; averred that the firm of Bassett & Aborn were indebted to him in the sum of \$10,000; that he was a creditor of the firm to that amount, and that it was indebted to him individually; that Aborn had individual property more than sufficient to pay his individual debts preferred in the assignment, and that he, Isaac H. Bassett, had individual property more than sufficient to pay all his individual debts, and those of Aborn; that Thomae has paid all the preferred creditors except Horatio Bassett; averred the proceedings in the action between Thomae and Horatio Bassett; that the plaintiffs have been paid a portion of their debt by receiving from the assignee a portion of the assigned estate, to wit, a parcel of goods, and that they received the same in part payment of their debt; that the assets of Bassett & Aborn exceeded their liabilities by over \$20,000; that the individual creditors preferred in the assignment have released the assignee. The defendant Aborn answered separately, and denied the fraud; averred that he had individual property more than sufficient to pay his individual indebtedness preferred in the assignment; that the assets of the firm exceeded their liabilities, and that the plaintiffs have accepted and received from the assignee a parcel of goods in part payment of their debt. By a stipulation between the parties, the allegations of the complaint were admitted, as to—1. The copartnership of the plaintiffs and of the defendants Bassett & Aborn. 2. The recovery of judg-

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ment by the plaintiffs. 3. The issuing and returning of executions thereon. 4. The then residence of the defendants Bassett & Aborn. 5. The execution and delivery of the assignment, and that the copy thereof set out in the complaint was correct. On the hearing of the case at special term, his honor Justice ROOSEVELT found in favor of the defendants on all the issues of fact; that there was no fraud, in fact, and that Bassett and Aborn had each, at the time of the assignment, more of individual property than sufficient to pay their respective individual debts preferred, and the complaint was therefore dismissed, with costs.

On the trial, the defendants raised the objection that the action was prematurely commenced; there having been but six days between the issuing of the plaintiff's execution and the commencement of this suit. It appearing, however, that the execution had been *actually returned* unsatisfied, before the suit was commenced, the court overruled the objection.

The plaintiffs appealed from the judgment rendered at the special term.

C. A. Seward, for the appellants.

E. & E. F. Brown, for the respondents.

By the Court, SUTHERLAND, J. It is hardly worth while to discuss the question, whether the decision of the court of appeals in *Wilson v. Robertson*, (21 N. Y. Rep. 587,) was the enunciation of a *new* principle. That court has decided, in that case, that the appropriation by an insolvent firm of partnership property to the payment of the individual debts of one of the partners, was not simply void, but was *fraudulent* as to the partnership creditors, under the statute, as hindering and delaying them in the collection of their debts; and is controlling in this case, as to that question of law.

The long settled and conceded principle, that equitably partnership property should be appropriated to the payment

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of partnership debts, and individual property to the payment of individual debts, will not alone enable the plaintiffs to maintain this action as judgment and execution creditors for their own benefit only; for this principle alone would not give them, as such creditors, any right or preference over other creditors of the firm, with or without judgments. This principle appropriates the partnership property to the payment of all the partnership debts, pro rata, and would not enable the plaintiffs to maintain this action in their own names alone, and for their own exclusive benefit. (*Kirby v. Schoonmaker*, 3 Barb. Ch. Rep. 46. *Nicholson v. Leavitt*, 4 Sandf. 278 to 308. *Wakeman v. Grover*, 4 Paige, 34; *S. C.* 11 Wend. 207.)

The plaintiffs' right then, to maintain this action, rests upon the principle held by the court of appeals in *Wilson v. Robertson*; that is, that an assignment by an insolvent firm, by which partnership property is appropriated to pay individual debts, is fraudulent and void as to creditors of the firm.

In this case, the assignment by the defendants Bassett & Aborn purports on its face to be not only an assignment of all the partnership property of the firm of Bassett & Aborn, but also of all their individual property, in trust to pay in full—first, the debts mentioned in schedule A; second, to pay in full the debts mentioned in schedule B; and lastly, to pay all other unpaid debts.

Schedule A specifies a debt of the defendant Aborn to Elizabeth A. Havens of \$100, for money lent; and a debt of his to Mary E. Tyler for money received for her use, of \$60 and interest. Schedule B specifies a note of the defendant Bassett to Mary E. Chamberlain for \$900, besides interest, and a note of his to Lydia F. Arnold for \$200, besides interest.

It appears then by the assignment on its face, that certain individual debts of each partner were preferred.

The case, I think, shows conclusively that Bassett & Aborn, as a firm, were insolvent when they made the assignment. The defendant Thomae, the assignee, testifies that the amount which had been realized from the assets of Bassett &

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Aborn was insufficient to pay the preferred debts; that the amount of outstanding debts against the firm was between \$70,000 and \$80,000; that he had in his hands about \$2886; that that was all he had to apply on the unpaid debts of at least \$70,000, except about \$7000 in old claims, from which he did not believe he would realize \$100. The assignment on its face states substantially the firm to be insolvent; for it recites that the assignors were "unable to meet their engagements and pay their debts as they severally mature."

The court below found as matter of fact, that Bassett & Aborn, at the time of making the assignment, were insolvent and unable to pay their debts, either out of the copartnership effects or their individual property.

Assuming that it appears on the face of the assignment that the firm was insolvent, yet I do not think that it can be said, giving full force to the decision in *Wilson v. Robertson*, that the assignment is fraudulent and void *on its face*; for the assignment on its face purports to be an assignment of all individual as well as of all partnership property; and from aught that appears on the face of the assignment, both partners may have had individual property when the assignment was made, more than sufficient to pay their individual debts preferred by the assignment. If in fact the assignment included sufficient individual property of each partner to pay his individual debts to be paid by the assignee, I do not think that the case of *Wilson v. Robertson* goes to the extent of holding that the assignment would be fraudulent, although in that case it would appear that the joint assignment included *some* individual property of the partner whose creditors were preferred.

If then in this case the assignment is to be held fraudulent and void, it must be upon the ground that the assignors had no individual property; or at least it should appear that they had not sufficient severally to pay their preferred individual debts.

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The question of fact, upon which the question of fraud or of fraudulent intent depends, is really the embarrassing question in the case. The court below found as facts, that at the date of the assignment Bassett & Aborn each had individual property sufficient to have paid the preferred individual debts under the assignment; that Bassett owned one half of the assets of previous firms of which he had been a member, and that \$5000 of such assets were collectable when the assignment was made; that Aborn owned household furniture which was worth \$500, but which might not have brought \$250 at auction, and also owned a third of the assets, of which \$5000 was collectable. After a careful examination of the evidence, I must say that in my opinion those findings of facts were erroneous, and not warranted by the evidence.

It was for the defendants to show, affirmatively and satisfactorily, that the individual property of each partner was sufficient to pay his preferred individual debts. Thomae, the assignee, testified that he had never received as assignee any individual property of either Bassett or Aborn. Bassett did not claim to have any individual property, except one half interest in some old claims of previous firms of which he had been a member, and \$10,000 due him from the firm of Bassett & Aborn for excess of capital contributed by him to that firm. He testified that the claims of previous firms consisted of from \$30,000 to \$40,000 of open uncollected accounts of the old firm of Bassett & Aborn, which existed from 1849 to 1851, and was then dissolved; that these claims were debts due the old firm at its dissolution in 1851. He did not undertake to specify any particular debt or account as being collectable, or as having any value at the date of the assignment. Aborn testified that he had no individual property at the time of the assignment, except his household furniture, and a third interest in the uncollected debts of the old firm of Richards, Bassett & Aborn, which was dissolved in 1849, and of certain other old firms. He further testified that he would not have taken \$1000 for his interest in the old claims

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at the time of the assignment, and thought there was \$5000 of them collectable; but when asked to specify any claim or debt which was collectable, he mentions a debt which was contracted in 1845, and which from his testimony it appears an unsuccessful attempt was made to collect in 1854.

Thomae, the assignee, testified in relation to these old claims or assets of old firms, that neither Bassett or Aborn called his attention to the old accounts or the books of the old firms; that no evidences of such claims were ever put in his hands; that he never collected any debts due either of the old firms; and that in the statement of the assets furnished him as assignee, there was no mention of any debts due the old firms; that Bassett told him he had assigned all his interest in the books of Richards, Bassett & Aborn long ago, and all the old concerns, as he understood him.

This was the principal and material evidence relating to these old debts or claims, and the interest of Bassett and Aborn individually in them. Does the evidence satisfactorily show that these old claims, or Bassett and Aborn's interest in them individually or otherwise, had any value? I think not. The evidence certainly does not show that any one of these old claims or debts, or any portion thereof, was collectable.

As to the \$10,000 debt claimed by Bassett to have been due him from the firm of Bassett & Aborn, it can hardly be said that the evidence in the case establishes that claim as a debt due from the firm to Bassett; but if it does, Bassett was not and probably could not have been preferred in the assignment. He must come in, if at all, as a general creditor under the assignment. The assignee testifies that the amount realized from the assigned assets was insufficient to pay the preferred debts; that none of the general creditors had been paid, and he had no funds to pay them. This claim of Bassett, then, against his firm, if it could be called a debt of the firm, could hardly be called property. It had no value.

As to the household furniture of Aborn; none of it passed

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into the hands of the assignee, or was included in the statement of the assigned property furnished the assignee. Aborn says it might not have brought \$250. I think it fair to assume that it was worth no more, and that it was excepted in the assignment as property exempt from execution.

My conclusion of fact then upon the whole case is, that it was not satisfactorily shown that Bassett and Aborn had either of them, at the date of the assignment, (August 15th, 1854,) individual property of any value over and above that by law exempt from execution, and as such excepted in the assignment; certainly not property of value amounting to any considerable portion of the preferred debts of each. And my conclusion of law is, that the assignment, under the decision of the court of appeals in *Wilson v. Robertson*, must be held to have been, and to be, fraudulent and void as against the plaintiffs as judgment and execution creditors.

It is true that the court below found as a fact, that there was no fraud or intent to defraud in making the assignment. I do not regard this finding of much importance. A man's intention is generally to be gathered from his acts, and the results of his acts.

The result of this assignment has been that a portion of the copartnership property of Bassett & Aborn has gone to pay their individual debts, leaving the plaintiffs and other partnership creditors unpaid. The assignee testifies that he had paid Bassett's individual debts, amounting to \$1406.58, and Aborn's individual debts, amounting to \$189.05, out of the copartnership assets. It may be that neither Bassett nor Aborn thought it fraudulent or morally wrong to pay their individual debts with their copartnership property; but the court of appeals have pronounced such an act fraudulent as to their partnership creditors; and perhaps it may be said that the court of appeals have pronounced such an act conclusive evidence of fraud.

The remaining material question in this case is, whether the plaintiffs were barred or estopped by the decree in the

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action of *Thomae v. Bassett and others*, from maintaining this action. I think they were not; because the plaintiffs in this action were not parties to that action; nor does it appear that the question of the validity of the assignment was raised or passed upon in that action. (*Vail v. Vail*, 7 Barb. 226. *Campbell v. Hall*, 16 N. Y. Rep. 575. *Mason's Ex'rs v. Alston*, 5 Selden, 28.)

I do not think the point taken by the defendants, that this action was prematurely commenced, well taken. The action was not commenced until the execution had been returned. It does not appear that it was returned within the sixty days, at the request of the plaintiffs or of their attorney. By the code, the execution is to be returned *within* sixty days. It can hardly be said that under the code the execution has a return day. The cases cited, *Cassidy v. Meacham*, (3 Paige, 311,) and *Williams v. Hogeboom*, (8 id. 469,) at most show probably only a *rule of practice* of the former court of chancery, not applicable to the present system.

Nor do I think the point, that the plaintiffs have waived their claim by long acquiescence, or by the acceptance of goods of the assignee, well taken. The assignee has yet in his hands \$2886, and it is the object of this action to reach that money. If the plaintiffs had waited until the assignee had appropriated it under the assignment, perhaps the plaintiffs would have been too late.

As to the goods in the bonded warehouse at the time of the assignment, and which were afterwards received by the plaintiffs, it does not appear that they were received by the plaintiffs on account of their claim in this action. As to those goods, the question appears to have been, whether they were the goods of the plaintiffs, or of Bassett & Aborn, at the time of the assignment. The assignee took legal advice, and was advised to give them up, and did give them up to the plaintiffs as their property, and as not having passed under the assignment. This appears from the testimony of the assignee.

The finding of fact below, "that after the assignment, the

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plaintiffs received from the assignee a quantity of merchandise purchased of them by Bassett & Aborn before their failure, in part extinguishment of the plaintiffs' claim," appears to me to be contradicted by the evidence, and to be clearly erroneous.

Upon the whole case, my conclusion is that the judgment below should be reversed and a new trial ordered; costs to abide the event.

New trial granted.

[NEW YORK GENERAL TERM, February 4, 1861. *Clerke, Ingraham and Sutherland*, Justices.]

THE MAYOR &C. OF THE CITY OF NEW YORK *vs.* THE SECOND AVENUE RAIL ROAD COMPANY.

Where the common council of the city of New York enters into a specific agreement with a rail road company, prescribing the regulations to which the latter shall be subject, requiring no further license, and reserving no right to require one, they are concluded by their contract from afterwards passing an ordinance requiring the taking out of a license and the payment of a fee by the company, as a condition precedent to the right to run its cars. *INGRAHAM, J.* dissented.

Such an agreement is neither more nor less than a license; and if it confers the right to run cars in a certain manner, through a specified portion of the city, no subsequent enactment can curtail that right.

A PPEAL from an order made at a special term, overruling a demurrer to the answer of the defendants.

CLERKE, P. J. This action is brought to recover from the defendants, as owners of a certain rail road car, a penalty of \$50 for running it below 125th street without a certificate of license, according to an ordinance of the common council requiring every passenger rail road car, running below that street, to pay into the city treasury annually the sum of \$50 "for a license or certificate of such payment to be procured

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from the mayor," under the penalty of \$50 for every car run contrary to the regulation, to be recovered of the proprietors of the car by the corporation attorney as in case of other penalties.

The defendants set out at length the agreement between their assignors and the corporation, entered into on the 15th December, 1852, by which they were authorized to lay rails in certain streets and to run their cars thereon; and they allege that they have constructed their rail road in pursuance of said agreement; that they have, in all respects, complied with its terms and conditions, and claim that they have full authority under the agreement to run their cars without paying \$50 annually for a license. The agreement contains no stipulation on the part of the defendants, or their assignors, to pay any license for running their cars, nor does it require any additional action, or any farther assurance or authority, to enable them to do what this agreement, of itself, expressly and unconditionally permits; unless it may be considered that the resolution of the common council recited in the agreement and made a part of it, imports a liability to pay any sums which the common council may thereafter think proper to impose. This resolution requires that the parties shall, before the permission takes effect, enter into an agreement with the mayor &c. of the city of New York, binding themselves "to abide by and perform the stipulations and provisions therein contained, and also all such other regulations or ordinances as may be passed by the common council relating to the said rail road."

A demurrer to the answer, as not constituting a defense, was overruled at special term.

I. Without, at present, considering the effect of the reservation contained in the resolution above referred to, the first question which presents itself is, whether the corporation could, without such a reservation, require the defendants to take out and pay for a license, after the execution of the agreement.

If an agreement of this kind were entered into, on behalf

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of a sovereign state possessing the power of imposing imposts or taxes for the support of government, the mere permission to do a certain thing would not exempt the grantees from liability to any tax to which persons in a similar occupation were made liable, even after the permission were given. All citizens are liable to contribute to the support of the government which protects them; they cannot be exempted from this, except by a special provision of law; and it would be just as reasonable to suppose, because a state conveyed land in fee simple absolute, with full covenants, that it exempted the land from taxation, as to suppose that a permission, like that involved in the present case, exempts the defendants from the payment required, if it was imposed by an authority possessing the taxing power.

But no municipal corporation of the present age, at least in this country and in England, possesses any such power. The supreme legislature of the state could not constitutionally delegate it. The common council has full authority, indeed, by virtue of the charters of James 2 and Queen Ann, to make laws, orders and ordinances for the good will, oversight, correction and government of the city, and may impose and tax reasonable *finer and amercement* *against and upon all persons offending against such laws, orders and ordinances*. It may, consequently, limit and prescribe the rate of speed, designate the stations or places where they should stop, and require them to adopt some method by which their approach may be made known to persons crossing the street; and as it may be indispensable to the public safety and convenience that rail road cars should, like other vehicles, be subject to supervisory regulation, it may ordain that they shall be licensed, and if the company shall neglect to take out the license, that they shall be subject to a penalty. But if the common council enter into a specific agreement with a company, prescribing the regulations to which the latter shall be subject, requiring no further license and reserving no right to require one, I think they are concluded by their con-

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tract from afterwards enacting that a license shall be a condition to entitle them to run their cars. This contract is nothing more or less than a license. This does not in any respect gainsay the doctrine laid down in *The Brick Presbyterian Church v. The Mayor &c. of New York*, (5 Cowen, 538,) and in *Coates v. The Mayor &c. of New York*, (7 *id.* 585.) I do not deny that no contract entered into by the corporation can curtail or supersede its action as a legislative body, within the sphere of its legislative powers. But I do deny that the right to establish ordinances &c. for the good rule and government of the city and to provide penalties for their breach, confers any right to impose a tax. In the language of a former counsel of the corporation, I may reiterate that the common council may provide that vehicles of a certain description shall be used, rates of speed may be limited, the particular places in which they shall stop may be designated, and *penalties may be imposed for any breach of these regulations*. This, however, is a very different power from that which provides that vehicles may be run, if a certain sum shall be paid; otherwise they shall not run. This is only a taxing power in the guise of establishing ordinances for good rule and government. Thus, as I have already said, the corporation may ordain that all public vehicles shall be licensed, and if their proprietors shall neglect to take out this license, that they shall be subject to a penalty. But if they ordain that the proprietors shall pay a license fee for the privilege of licensing, and not as a penalty for disobedience, it is an attempted exercise of the taxing power, which no subordinate legislative body under our institutions can possess. The license to run in the present instance had been granted by solemn agreement, and of course, in running pursuant to that license or agreement, the defendants violated no ordinance, so as to have made themselves liable to the imposition of a penalty.

II. Is any such right reserved in the agreement, under consideration, in the present case? A resolution, as we have be-

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fore noticed, was passed during the negotiation between the parties, that the assignors of the defendants should bind themselves to abide by and perform the stipulations and provisions contained in the agreement, and "also all such other regulations or ordinances as may be passed by the common council relating to the said road."

Now if the agreement, of itself, confers the right to run in a certain manner through a specified portion of the city, no subsequent enactment can curtail this right. The agreement itself, I repeat, is a license. By this agreement the common council has thought proper to give the defendants liberty, or license, to run their cars. It could not, therefore, have been in the contemplation of either of the parties to the agreement that any further license should be necessary. The license, given by the agreement, was unqualified; and, therefore, the ordinance incorporated into that agreement, by which the defendants are bound to abide by all other regulations or ordinances which may be thereafter passed by the common council, could not have included a regulation or ordinance requiring any additional license. If this was intended, the requirement should be expressed in specific terms.

Preceding the introduction of this resolution, provisions were set forth relative to the mode of laying the rails, keeping the streets in and about them in repair, confining the propelling power to horses, regulating the number of times the cars should be run during the day and between what hours, and providing that they should be run as much oftener as public convenience may require, "under such directions as the common council may from time to time prescribe, also prescribing limits to the rate of fare, and reserving to the corporation the right to regulate the fare for the whole length of the road when completed to Harlem river." Immediately following this comes the resolution that the parties shall in all respects "comply with the directions of the street commissioner and of the common council in the building of the road, and in other matters connected with the regulation of

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the road." This is followed by the ordinance, on which I have been commenting; and I have no doubt that the words "other regulations and ordinances," which it contains, meant such ordinances or regulations as the common council might afterwards think necessary for the regulation of the road, in regard to the public safety and convenience. It gives the common council the power, in certain respects, to make further necessary or expedient provisions for the regulation of the road; it by no means imports a right to nullify the license, which the agreement itself gives. It reserved the right, in short, to regulate the mode of running, not to nullify the privilege of running altogether. For this would be the effect of allowing the common council to impose a license fee upon the company; it would be allowing the plaintiffs to say we now order you no longer to run your cars, unless you pay us a heavy fine or penalty, although we have already promised that you should run without requiring the payment of any sum. If they have the right to impose the payment of \$50 they have the right to impose any greater sum, which may be so oppressive as to make it no longer worth while to continue running the cars; and thus in effect rescinding the agreement, without any violation of it on the part of the defendants. The power to impose this fine, not being reserved in the agreement, and the common council not having the power to impose a tax, the claim of the plaintiffs is therefore not sustainable. The plaintiffs cannot object to the assignment of the agreement by the original parties, to the defendants. Since the date of the assignment, the defendants have constructed the said road, have in all respects complied with the terms and conditions of the agreement, and, during a period of several years, have been recognized and dealt with by the plaintiffs as the proprietors of the road and the assignees of the original parties.

The order of the special term should be affirmed with costs, and there should be a judgment for the dismissal of the complaint.

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SUTHERLAND, J. I look upon the question raised by the demurrer in this case, as a question of property, of vested rights, resting on or secured by grant or contract.

The resolutions and agreement set up in the defendants' answer were in effect the grant of a valuable franchise or property. The agreement was not only in effect but in form a contract; and the franchise which is the subject of it is as much within the protection of the constitution, as any other property or right resting on, or derived from, contract. (*Dartmouth College v. Woodward*, 11 *Wheat.* 511.)

The question of the power of the common council, independent of the state legislature, to make this grant or contract, is not in this case: it is not raised by the demurrer. This action for the penalty of \$50, under the ordinance of the 31st December, 1858, affirms, or at least assumes, the right of the defendants to run their cars, and to enjoy, or exercise, the franchise originally granted, by paying the license fees exacted by that ordinance.

The question of the right of the original grantees to assign to the defendants, is not in the case. This action affirms, or at least assumes, the right of the original grantees to assign, for it assumes the present right of the defendants to run their cars under the original grant or contract by paying the license fees and taking out the certificates of license.

The franchise granted is of course held by the defendants, and is to be enjoyed by them, upon the terms and conditions specified in the grant or contract; and I think the question in the case really is, whether, from the grant, contract, or agreement itself, it can fairly be inferred that the plaintiffs intended to reserve the right, thereafter at any time, and from time to time, to impose the payment of these license fees without limitation as to amount, and thus impair, if not utterly destroy, the franchise granted.

But it is suggested that, irrespective of the terms and conditions of the contract, the plaintiffs had a right to impose the payment of these license fees; that the ordinance impos-

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ing them was and is an act of legislation ; that the plaintiffs cannot grant away their right of legislation ; that the grant to the assignors of the defendants of the franchise in question must be presumed to have been made subject to the right thereafter to impose the payment of these license fees as a legislative act ; and the cases of *The Brick Presbyterian Church v. The Mayor &c.*, (5 Cowen, 538,) and of *Coates v. The Mayor &c.*, (7 *id.* 585,) are referred to as sustaining this principle.

I do not doubt that grants of property or of franchises, by the city corporation, must be deemed to be made and received subject to the right of future municipal police regulations, the same as if granted by an individual ; and this is the principle established by the cases in 5th and 7th Cowen. In the case in 5th Cowen, the ordinance prohibiting the use of the premises as a cemetery was strictly a municipal law or police regulation, authorized by an act of the legislature. But suppose the ordinance, instead of prohibiting the use of the premises as a cemetery, had imposed a license fee of \$50 for each body thereafter to be interred in the premises, would the court have held such an ordinance a repeal of the covenant for quiet enjoyment ? I think not. No one can fail to see, I think, that such a decision would have done violence to justice and the constitution, by destroying the contract between the parties.

No doubt the grant of a ferry franchise would be deemed to be made subject to such future municipal police regulations or laws as the public safety or health might require. And an ordinance absolutely prohibiting the use of the ferry during the prevalence of an infectious or contagious disease, might be justly held not at all to interfere with the covenant for quiet enjoyment in the lease or grant of the ferry. But would the city corporation, after leasing a ferry for a certain term at a certain rent, have a right to impose a license fee of \$50 for each ferry boat used ? It is plain it would not, independent of the contract. And yet it appears to me that

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that is the precise question in this case, irrespective of the express terms and conditions of the contract. The distinction must be taken between a general municipal law or ordinance for the public safety or good, and a law (if you choose to so call it) or ordinance for the pecuniary benefit of the city corporation as a legal entity or person capable of granting property, and entering into a contract with reference to it. No doubt the city corporation has power to impose a license fee for the use of public carriages; but the question is whether, after having licensed a public carriage for a certain fee, for a certain term, or for a certain term without the payment of any fee, it has a right during the term to impose the condition of the payment of an additional license fee in the former case, or of any license fee in the latter case, without having reserved such right? Plainly not, if the license is deemed to be a valid subsisting contract.

I presume public lands might in effect be granted by an act of congress or of the state legislature, without the formality of a patent or other instrument. Of course such lands after the grant would be taxable by general laws imposing taxes; but could congress or the state legislature, by a special law impose, as a condition of enjoying the lands so granted, the payment of a certain annual sum of money as rent, or as a tax for the use of the land? I think not, although the act of congress or of the legislature would not be in the form of a grant or contract.

The question whether the plaintiffs, independent of the act of 1854 affirming the grant to the defendants' assignors, had a right to revoke the grant, is not in this case. The right to revoke the grant itself is one thing; the right to affirm it, or at least to assume its existence, and at the same time to impair or destroy its value, is another thing. I am free to say, however, that I do not see upon what principle it could be claimed that the grant could be revoked at the mere will of the corporation.

If the plaintiffs have a right to impose a license fee of \$50

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for each car, they have a right to impose a license fee of \$5000 for each car, and thus they could utterly destroy their own *executed* gift, if no consideration was paid for the grant. Or if a consideration, and a large one, was paid, they could thus, under the form of a license fee, exact such other and further consideration as they saw fit.

I presume that an *executed* gift can no more be revoked or repudiated than a bargain and sale. Besides, if the grant could originally have been called a gift, the defendants under it have built their road, it must be assumed, at large expense, and thus they have a large vested interest under the grant.

Upon the whole, on the grounds which have been above barely suggested, I am of the opinion that the plaintiffs' right to recover in this action must rest exclusively upon the terms and conditions of the written contract; and as I agree with Judge Clerke in his construction of the written contract, I also concur in the conclusion to which he has arrived, that the order of the special term should be affirmed, and the complaint dismissed with costs.

INGRAHAM, J., (dissenting.) The questions argued in this case arise upon a demurrer to the answer of the defendants. The plaintiffs claim to recover a penalty of fifty dollars against the defendants for a violation of the corporation ordinance for licensing rail road cars, which prohibited the running of cars in the city without such license, under such penalty. The answer admits all the facts set up in the complaint, and by way of defense sets up an agreement made between the plaintiffs and Denton Pearsall and others granting them permission to lay the rail road track through the second avenue, in pursuance of resolutions of the common council, and claiming that they have full power to run their cars upon their said rail road without paying any license fee. To this answer the plaintiffs demur.

There is nothing in the resolutions of the common council making the grant, nor in the lease executed in pursuance of

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such resolutions, which specially exempts the defendants from the payment of fees for such licenses, or from the necessity of taking out licenses if required so to do by law. The question, therefore, must be decided upon the broad ground that the corporation have no power to require a license to be taken out in regard to the using of rail road cars. Or that the grant to the parties who originally received it, by not reserving the right to impose such license when required by law, relieved the defendants from any obligation to take out such license even if the common council had authority to require it in other cases.

Upon the first question I think there can be no doubt. It is not to be expected that, in the ancient charters of the city, special references should be made as to modes of conveyances not then in existence or even thought of, but in the Montgomery charter ample provision is made for the passage of all laws, ordinances and statutes which to them shall seem good, useful or necessary for the good rule of the citizens, inhabitants and residents of the said city, and for the further public good, common profit, trade and better government and rule of said city. (*Sec. 14 of the Montgomery Charter.*)

The same section also authorized the common council to ordain such penalties as they should think necessary against persons who should offend against such law. The powers granted by this charter in regard to passing laws and ordinances for the good government of the city, have never been taken away or limited by legislative enactments. On the contrary, laws have frequently been passed confirmatory of such powers, or extending them where doubt existed as to the extent of them; and although many of those laws were unnecessary, I know of none in which any attempt was made to take away the powers thus conferred, except so far as the inspection laws on the sale of merchandise, &c. were abrogated by the constitution.

The right to require licenses for public carriages used for the conveyance of passengers, is necessarily embraced in the

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powers above referred to. And while the exercise of this power in regard to stages, omnibusses, carriages and other modes heretofore in use is not objected to, I see no good reason why the same should not be extended to rail road cars, simply because they are drawn on rails laid in the streets. The question is as to the power of the common council to require a license, irrespective of the charge, as a mere police regulation. The fee to be charged for it is a mere collateral matter, not affecting the right to require a license.

The other question is, whether the grant of the franchise of laying rails through the second avenue, to the assignors of the defendants, prevents the plaintiffs from passing an ordinance requiring the defendants to take out such license.

I suppose it to be well settled that a corporation in dealing with its property or in making contracts in regard thereto, as well as in making grants of its property or franchises, is only to be regarded as an individual; that all such grants and contracts, when made by them, are to be made subject to the general legislation of the city and of the state, and that it is not necessary in such grants to reserve any right to legislate on subjects connected therewith.

The conveyance of a lot of land by the city to an individual with all the covenants of warranty and quiet enjoyment, does not relieve the owner from paying the taxes which are annually imposed upon it. The conveyance of a house and lot would not prevent the common council from increasing the tax for water to be imposed thereon.

The grant of a ferry franchise would not prevent the common council from any general legislation in regard to ferries which by law is within their powers, although such legislation might operate injuriously to the grantees. The right of the common council thus to legislate, even to the injury of grantees holding under them, has been the subject of adjudication. In the case of *The Brick Presb. Church v. The Mayor &c. of New York*, (5 Cowen, 538,) it was held that a grant of land by the corporation for the purpose of a cem-

Mayor &c. of New York v. Second Avenue R. R. Co.

etery, with a covenant of quiet enjoyment, did not prevent the passage of an ordinance prohibiting interments in that part of the city where the land was situated. Chief Justice Savage says: "In ascertaining their rights and liabilities as a corporation or as an individual, we must not consider their legislative character. Their enactments in their legislative capacity are to have the same effect upon their individual acts as upon those of any other person." The same rule was laid down in *Coates v. The Mayor &c.* (7 Cowen, 585.)

These cases, however, not only hold that the grant does not prevent the subsequent passage of a by-law at variance with it, but they go farther, and deny the power of the corporation acting in regard to their property to make any grant or covenant which would be at variance with their subsequent legislation.

In the case in 5 Cowen, at page 540, Chief Justice Savage says, referring to the corporation, "They had no power as a party to make a contract which should control or embarrass their legislative capacity." So in *Milhan v. Sharp*, (17 Barb. 435,) Mr. Justice Harris held that a clause in a grant of a rail road giving the right to charge a particular rate of fare, was in violation of the authority conferred upon them to regulate the rates of fare, and says: "The members of the common council, by which this resolution was adopted, were not authorized thus to invade the legislative power of their successors." And in *N. Y. and Harlem R. R. Co. v. The Mayor &c. of New York*, (1 Hilton, 585,) Hilton, J. says: "The corporation cannot surrender (any power conferred by law) into the hands of private individuals or of a private corporation; and any attempt to do so, without such authority, would be utterly void."

The act of 1854, confirming the grant to the defendants and other grantees under these grants by the common council, was not intended and did not operate to extend the grant beyond the terms of it. It left them still liable and subject to

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the general legislation of the city, which did not deprive them of the rights therein granted.

The judgment appealed from should be reversed, and judgment ordered for the plaintiffs on the demurrer, with leave to the defendants to amend their answer on payment of costs.

Order affirmed, with costs.

[NEW YORK GENERAL TERM, February 4, 1861. *Clerke, Ingraham and Sutherland, Justices.*]

WILDER and others vs. LANE and others.

Where judgment has been rendered, at a special term, in favor of the plaintiffs, on demurrer to the complaint as being frivolous, and the defendant has appealed from that judgment to the general term, the respondent cannot make a motion — grounded on the frivolousness of the demurrer and of the appeal — that the case be heard out of its order on the enumerated calendar.

MOTION, by the respondents, that an appeal be heard out of its order on the enumerated calendar.

J. M. Van Cott, for the respondents.

Mr. Larocque, for the appellants.

By the Court, SUTHERLAND, J. Judgment was rendered at special term in this case in favor of the plaintiffs, on the demurrer of the defendants to the plaintiffs' complaint, as frivolous. The defendants appealed from this judgment to the general term. The respondents now make a motion, (grounded on the frivolousness of the demurrer and of the appeal,) that the case be heard out of its order on the enumerated calendar. The motion cannot be granted. There is now no rule or practice of this court which authorizes us

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to grant the motion, whatever power the court may have to make such a rule, or adopt such a practice.

Under the old practice, by a rule of the court, bills of exceptions and demurrers could be noticed as frivolous, and brought on to argument as such, during the first week of the term, but no argument was allowed, to show that they were frivolous. (*Rogers v. Hosack*, 5 Hill, 522.)

No doubt frivolous appeals are quite common, and produce great inconveniences and injuries, but it is obvious that, under the code and our present system of practice, it would not do to make a general rule that all appeals might be noticed and brought on to argument as frivolous; for many appeals involve questions of fact as well as law, and it would take as much time for the court to possess itself of the facts, for the purpose of determining whether the appeal was frivolous, as it would to decide the appeal on its merits.

As to a certain class or classes of appeals, involving only questions of law—such as appeals from judgments on demurrer—it appears to me that a rule allowing them to be noticed as frivolous, and to have a preference when so noticed, might be adopted with relief to the court, and advantage to respondents.

As no such rule or practice has been adopted since the code, the motion must be denied, but without costs, as we think the counsel for the respondents, in this case, was justified, from the frequency of frivolous appeals, in calling our attention to the subject of this motion.

Motion denied.

[NEW YORK GENERAL TERM, February 4, 1861. *Clerke, Allen and Sutherland*, Justices.]

McMAHON, assignee &c. *vs.* ALLEN.

One who has conveyed real estate to another, by deed, and who has a right of action against the grantee to have the conveyance declared void, and set aside, on the ground of fraud, undue influence, inadequacy of price, &c. cannot, without possession and without any present estate or interest, assign such right of action to another, so as to enable the assignee to bring an action in his own name, to set aside the conveyance.

The provision of the code, that "every action must be prosecuted in the name of the real party in interest," was not intended, and has not had the effect, to make things in action or rights of action assignable which were not before assignable even in equity; but was intended to give to the assignee of a thing in action which *was assignable* in equity, a right to sue in his own name.

A mere personal right to avoid a deed on the ground that the grantor has been defrauded, cannot be called a chose in action, within the most extended definition of that phrase.

APPEAL by the defendant from a judgment entered on the report of a referee, upon exceptions taken on the trial and after the making of the report. The action was commenced by the plaintiff, Dennis McMahon, jun. as assignee, under an assignment executed by Charles T. Harrison, in trust for the benefit of creditors, and was brought for the purpose of setting aside a conveyance previously executed by Harrison to the defendant of certain real estate therein described. The referee found—1. That Charles T. Harrison, on the 22d day of March, 1852, was owner of a life estate in the lot and buildings known as No. 694 Houston street, in the city of New York, as tenant in common with his brother Samuel C. Harrison, on which premises was a mortgage of \$5000, and they were worth, over and above said mortgage, \$5000; and the value of said Charles T. Harrison's life interest in the same was about \$1800. 2. That on the said 22d day of March, the defendant was indebted to Charles T. Harrison in about the sum of \$500, for moneys received by the defendant belonging to the said Charles T. Harrison, being in part proceeds of the interest of the said Charles T. Harrison in a surplus arising from the sale of certain mortgaged premises, No.

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14 Charles street, in the city of New York, in which said Charles T. Harrison had an estate in fee simple, and in part of rents of said premises, and of said lot No. 694 Houston street, collected by the defendant for said Charles T. Harrison without any express authority for so doing, but in collecting which he assumed to act and did act as his agent. 3. That on said last mentioned day, Charles T. Harrison owned an interest in certain trusts under his mother's will of personal estate, which might under some circumstances be of considerable value. 4. That at the time last mentioned, and for about seven years previous thereto, the said Charles T. Harrison was and had been a mariner, following the navigation of the high seas for a livelihood; was about 25 years of age, and had acquired reckless and improvident habits; was unacquainted with business affairs as transacted on land; was easily led and persuaded to do foolish and improvident acts, and on said 22d day of March, 1852, was needy and in want. 5. That at and before said 22d day of March, 1852, the defendant stood in a fiduciary relation to said Charles T. Harrison, having assumed to act, and having acted as his agent in the collection of his interest in the rents of 694 Houston street and No. 14 Charles street, and in receiving the surplus aforesaid, though without express authority for so doing, and had been the agent in fact of the executor of the will of the mother of Charles T. Harrison, and which executor, by the will, was trustee of various personalty directed to be invested for the said Charles T. Harrison and his brother. 6. That the conveyance and deed, mentioned in the pleadings, executed by Charles T. Harrison, bearing date the 22d of March, 1852, was obtained by the defendant by unjust and inequitable means; that Charles T. Harrison was ignorant of business, ignorant of the situation and value of his property, unacquainted with the state of accounts between him and the defendant, and utterly unable of himself to investigate and ascertain his rights; that he had no counsel to advise and assist him; that all those circumstances were known to the

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defendant; that the defendant did not disclose, but concealed the true state of the accounts between him and Charles T. Harrison; that Charles T. Harrison was destitute of money, and a reckless, improvident and dissipated sailor, all of which was known to the defendant; that Charles T. Harrison was drawn into the bargain, which resulted in the deed of March 22, 1852, by the defendant; and that the consideration paid by the defendant for the said deed was grossly inadequate; and finally, that the conduct of the defendant in obtaining and taking said deed was inequitable and fraudulent. 7. That the sums actually paid by said defendant to Charles T. Harrison therefor were, in gross, about the sum of \$1100, of which Harrison received about \$700 in money, \$150 in a gold watch, and \$250 was paid to the counsel of the defendant, for which Harrison derived no benefit or value. That the actual value of the estate so conveyed, in addition to the indebtedness so existing from the defendant to the said Charles T. Harrison, was at least \$2300, and under some contingencies was worth a much larger sum. That at the time of such conveyance to the defendant; there were creditors of the said Charles T. Harrison, amounting to at least \$600, who were prejudiced thereby, the said Charles T. Harrison himself being guilty of no fraud in making such conveyance. 8. That on the sixth day of August, 1852, the said Charles T. Harrison, by deed of assignment, conveyed to the plaintiff, for the benefit of his creditors, all and singular his estate, real and personal, and his rights of action, with full power to sue for, and collect the same, which assignment the plaintiff accepted and acted upon. 9. That on the third day of September, 1852, the defendant, by a further imposition and fraud practiced upon the said Charles T. Harrison, procured from him, for a trifling consideration, a paper writing, attempting to revoke said assignment to the plaintiff. From which facts the referee found as conclusions of law: 1st. That Charles T. Harrison possessed a vendible interest in the premises 694 Houston street, above described; also in

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the indebtedness due him from the defendant; also in the personal estate of his mother under her will and codicil, which he could convey and release; and that even if he had no such vendible interest, that the defendant was estopped by his acts and declarations from averring that Charles T. Harrison had no such right to convey or release. 2d. That the conveyance and release by Charles T. Harrison of such estate, interest and indebtedness to the defendant was void, because of the fraudulent acts and concealment of the defendant, in inducing and procuring the same to be made; and also because of the fiduciary relation in which the defendant stood to the said Charles T. Harrison, the consideration being inadequate; and also because the said Harrison was a mariner, and the bargain was a bargain made with an inadequate consideration; and also because at the time the same was made the said Harrison was needy and in want, and was unacquainted with the nature and extent of his said interest in his mother's estate; and the defendant took advantage of the same, and concealed from him the true situation and value of said interest, and that the allegations of the complaint in that behalf, in this cause, are fully proven therein. 3d. That the plaintiff, as assignee for the general benefit of creditors, under the assignment to him by said Charles T. Harrison, was entitled to maintain this action, and to have the said conveyance set aside, and the property and rights reconveyed by the defendant to the plaintiff, as such assignee, and to have the defendant account and pay over to him, as such assignee, the sums of money which the defendant owed said Charles T. Harrison at the time of such conveyance, and also any sums of money, rents, or interest of moneys which the defendant had received of and from the said premises so conveyed, before or since that conveyance, belonging to the said Charles T. Harrison, or to the plaintiff, as his assignee, after deducting the moneys and value of the watch received by Charles T. Harrison, of the defendant, as a consideration for such conveyance thereby set aside; the principles of which ac-

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counting, and the decree thereon, were settled in the report. 4th. The referee further found, as a matter of law, the paper writing procured by the defendant, of the said Charles T. Harrison, the third of September, 1852, revoking such deed of assignment, to be fraudulent and void, and inoperative, and ineffectual for that purpose. 5th. That the plaintiff was entitled to recover his costs and disbursements in this action against the defendant, to be adjusted.

Albert Mathews, for the appellant.

D. McMahon, respondent, in person.

By the Court, SUTHERLAND, J. If Charles T. Harrison could assign the alleged cause of action in this case to the plaintiff, so that the latter could bring this action *in his own name*, I am inclined to think it passed to the plaintiff by the assignment, although that instrument certainly does not in express terms assign, or purport to assign to the plaintiff, the assignor's alleged right to have his previous conveyance to the defendant, Thomas E. Allen, declared void and set aside on the ground of fraud. But assuming that Charles T. Harrison, at the time of his assignment to the plaintiff, had this cause or right of action, so that *he*, by an action in his own name, could have had his conveyance to the defendant declared void and set aside on the ground of fraud, undue influence, inadequacy of price, &c., could Charles T. Harrison assign that cause or right of action to the plaintiff so that the plaintiff could bring the action in his own name?

I shall examine this question in the first instance; for if the plaintiff's alleged cause of action in this case was not susceptible of assignment, and therefore did not and could not pass to him under the assignment, the judgment below must be reversed on that ground alone, and it will not be necessary to examine or pass upon any other question in the case.

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The deed from Charles T. Harrison to the defendant purports to convey all the share, right, title and interest of the said Charles T. in or to the estate, real and personal, of his late mother, Ruth S. Rathbone, deceased, as devisee or otherwise, describing certain choses in action, and certain real estate, to wit, a lot on Houston street, and mentioning certain moneys as belonging to said estate.

The referee, to whom this action was referred, finds as facts—that Charles T. Harrison, on the 22d day of March, 1852, (date of deed to the defendant,) was owner of a life estate in the lot and buildings known as No. 694 Houston street, as tenant in common with his brother Samuel C. Harrison; and that he also had an interest in certain trusts under his mother's will of personal estate, which might under some circumstances be of considerable value; and that the defendant was indebted to Charles T. Harrison in about the sum of \$500 for the interest of the said Charles T. in certain surplus moneys on a sale of certain mortgaged premises. The referee does not find, nor does the evidence show, that Charles T. Harrison had any other property, right, estate or interest which his deed to the defendant could or did convey or release.

The referee finds the value of the life interest in the Houston street lot to have been \$1800, and the value of the whole estate or property conveyed, in addition to the indebtedness of the defendant to Charles T. Harrison, to have been \$2300.

The plaintiff's cause of action, if he has any, must be considered to be a right to have the conveyance from Charles T. Harrison to the defendant set aside as fraudulent and void; for the other and further relief asked for is asked for and can only be granted as incident to, or following from, the principal or main relief; which is to have the conveyance set aside, so that the plaintiff can have the reconveyance and other relief asked for.

Assuming that the deed was fraudulently obtained by the

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defendant from Charles T. Harrison, or obtained under circumstances which would authorize a court of equity to declare it void, yet it was not void, but *voidable*, when Charles T. Harrison made his assignment or conveyance to the plaintiff, and must remain voidable until so declared to be void. (*Anderson v. Roberts*, 18 *John*. 515. *Somers v. Brewer*, 2 *Pick*. 184. *Burley v. Bigelow*, 12 *id.* 312.) A bona fide purchaser from the defendant without notice would have acquired a good title. (*Jackson v. Henry*, 10 *John*. 186. *Jackson v. Walsh*, 14 *id.* 414. *Mowrey v. Walsh*, 8 *Cowen*, 238.) Charles T. Harrison then, at the time of his assignment or conveyance to the plaintiff, had neither the possession of, nor any estate or interest in, the property or things he had conveyed or released to the defendant, but only a naked right of action to have his conveyance to the defendant declared void, so that he could be reinvested with his former rights and interests. Could he, without possession and without any present estate or interest, assign his mere right to have his conveyance to the defendant declared void? That is the question. Can his assignee, the plaintiff, bring an action in his own name for that purpose? It may be conceded that the conveyance or assignment by Charles T. Harrison to the plaintiff was and is valid and operative, so as to vest in the plaintiff all the estate and rights of Harrison in the property, when in an action by or in the name of Harrison his conveyance to the defendant shall be declared void; but it by no means follows that such conveyance to the plaintiff also gives him a right to bring an action to avoid Harrison's conveyance to the defendant. The right to bring an action is not necessarily included in the right to purchase. I do not see why damages, to be recovered for an assault and battery or other personal tort, in the name of the party injured, cannot be assigned. A deed of lands held adversely is good between the parties to it, although void as to the party holding adversely. It is good against the grantor and his heirs; but it cannot be enforced in the name of the grantee,

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although he may enforce it in the name of the grantor. (*Livingston v. Proseus*, 2 Hill, 528. *Cameron v. Irwin*, 5 id. 282. *Keneda v. Gardner*, 3 Barb. S. C. R. 593.) I do not think it can properly be said to have been decided in *Livingston v. The Peru Iron Co.* (9 Wend. 512,) cited by the plaintiff, as the head note would lead one to suppose, that an adverse possession could not be founded on a deed fraudulently obtained; that is, upon a deed voidable merely, not void; but if it was so decided in that case, such decision was reversed or disapproved of in *Humbert v. Trinity Church*, (24 Wend. 610-635, &c.)

A subsequent conveyance by the grantor of a deed obtained by fraud, would be void as to the party in possession claiming title under the fraudulent deed, so as to protect him from an action in the name of the second grantee, but good between the parties, so as to convey the lands and the grantor's estate therein, when the fraudulent deed should be declared void and a reconveyance decreed in an action in the name of the grantor. Independent of the question of adverse possession, the court of appeals held in *Nicoll v. The New York and Erie Rail Road Co.* (2 Kern. 121,) that a mere naked right of entry could not be assigned.

The provision of the code, that "every action must be prosecuted in the name of the real party in interest," was not intended, and has not had the effect, to make things in action or rights of action assignable which were not then assignable even in equity, but was intended to give the assignee of a chose or thing in action which was assignable in equity, a right to sue in his own name. (*McKee v. Judd*, 2 Kern. 622. *The People v. Tioga Com. Pleas*, 19 Wend. 73.)

I do not think that Charles T. Harrison's personal right to avoid his deed to the defendant on the ground that he had been defrauded, can be called a chose in action within the most extended definition of that phrase. To say that the plaintiff is the party in interest, and therefore can bring the action in his own name, is assuming the very thing in ques-

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tion. If the deed from Charles T. Harrison to the defendant was voidable merely, not void, then Charles T. Harrison had no interest to assign to the plaintiff, and the question is, whether he could assign to the plaintiff his right to avoid the conveyance for fraud, so that he might have an interest, which might pass to the plaintiff under the conveyance or assignment to the plaintiff.

In *Prosser v. Edmonds*, (1 *Young & Coll. Ex. Rep.* 481,) it was held that a mere right of action to avoid a conveyance for fraud on the assignor himself, was not assignable in equity, upon the ground that to allow it to be so assignable would be contrary to sound policy as indicated by laws against champerty and maintenance. (*See also Story's Eq. Jur.* § 1040.)

As the theory of the plaintiff's complaint and of his whole case is, that the deed from Charles T. Harrison to the defendant was void as to Harrison, on the ground that he was defrauded, not that it was void as to the creditors of Harrison, on the ground that it was made and accepted with intent to defraud his creditors, it is hardly necessary to say that on this question of assignability, it is quite immaterial whether the plaintiff is a bona fide purchaser for value, or a mere voluntary assignee for the benefit of creditors. If the plaintiff should be considered as a mere voluntary assignee for the benefit of creditors, the cases cited by the counsel of the defendant to show that such voluntary assignee cannot impeach a conveyance of his assignor as fraudulent against creditors, have no application to the question of the right of the plaintiff to bring this action in his own name, for a conveyance to defraud creditors is good and valid as to both the parties to it; but this action was brought upon the theory that the deed to the defendant was good as to him but void as to Charles T. Harrison, the plaintiff's assignor, and I have assumed this to be so, in looking at this question of assignability. A deed void as to one of the parties to it, but valid as to the other, cannot be said to be absolutely void, but voidable. (*Ander-*

son v. Roberts, 18 John. 515, before cited. Bac. Abr. title Void and Voidable.)

As the assignment by Charles T. Harrison to the plaintiff was made, and this action was commenced, long before the act of April 17th, 1858, declaring and extending the powers of assignees, receivers, &c. "to protect the rights of creditors and others against frauds," &c. was passed, it is plain, whatever may be the construction or effect of that act, that it could not give the plaintiff a right to bring this action in his own name, and does not relieve his case from the question of assignability.

It may be conceded that the right to avoid a conveyance of real estate, or a contract as to personalty, for fraud, would survive to the heir, devisee, or executor of the party defrauded; but I do not see that the fact of such involuntary transfer or right of survivorship by force of the law can have much weight on the question of voluntary assignability in this case.

The statute against champerty does not apply to devises. A devise is good notwithstanding an actual disseisin. (*Varick v. Jackson*, 2 Wend. 167.)

A mere right of entry survives to the heir or devisee. The executor may have a right to avoid a contract as to personalty made by the testator, on the ground that the testator had been defrauded, without interfering with the principle upon which laws against champerty proceed, or the sound policy indicated by them.

Upon the whole, I am of the opinion that Charles T. Harrison could not assign to the plaintiff the right to bring this action in his own name; and that the judgment below should be reversed and a new trial ordered, with costs to abide the event.

Judgment accordingly.

[NEW YORK GENERAL TERM, February 4, 1861. *Clerke, Sutherland and Allen*, Justices.]

34	66
1h	649
27h	372
99a	450

MOSSELMAN and POELART, trustees &c. *vs.* CAEN.

Our courts will not recognize or enforce a right or title acquired under a foreign bankrupt law, or foreign bankrupt judicial proceedings.

Accordingly *held* that an action could not be brought, in the courts of this state, by trustees of the estate and effects of a firm declared by the tribunal of commerce of the city of Brussels, in Belgium, to be insolvent and bankrupt, to recover the possession of certain goods and chattels in the possession of the defendant, in this state, the title and right of possession of which was claimed to have passed to the plaintiffs as such trustees, under and by virtue of such bankrupt proceedings.

But the objection to the right of the trustees to recover, in such a case, for want of legal capacity to sue, or of jurisdiction, cannot be raised for the first time on an appeal to the general term. If the defendant omits to take the objection by demurrer, or at the trial, he will be deemed to have waived it.

Semble, that after having failed to demur, the defendant cannot raise the question as to the legal capacity of the plaintiffs to sue, at the trial. *Per* CLERKE, P. J.

APPEAL by the defendant from a judgment entered at a special term upon the verdict of a jury. The opinion of the court sets forth the material facts.

Fullerton & Spilthorn, for the respondents.

A. J. Vanderpoel, for the appellant.

By the Court, SUTHERLAND, J. This action was brought by the plaintiffs as trustees of the estate and effects of the firm of Sichel & Company, merchants of Brussels in the kingdom of Belgium; the plaintiffs having been appointed such trustees by the court called the tribunal of commerce of the city of Brussels, which court had declared the said firm insolvent and bankrupt. The action was brought to recover the possession of certain goods and chattels in the possession of the defendant in the city of New York, the title and right of possession of which, it is alleged, passed to the plaintiffs as such trustees, under and by force of such bankrupt proceedings in Belgium.

The complaint alleges the plaintiffs' title through or under the foreign bankrupt proceeding, the possession of the defend-

Mosselman v. Caen.

ant, and certain other matters to show that the plaintiffs, as such trustees, have the title and right of possession of the goods as the property of the bankrupt firm. The defendant appeared in the action and put in an answer. On the trial there was a verdict for the plaintiffs, and the jury assessed the value of the property at \$980.53. The appeal is upon the roll of the judgment entered on this verdict, without any case having been made, or exceptions taken.

It is clear that the complaint shows no right or title in the plaintiffs to the goods, which the courts of this state will recognize or enforce. It may be that it shows a right or title which they could avail themselves of without resorting to our courts; but the case of *Abraham v. Plestoro*, (3 *Wend.* 538,) which has been confirmed by subsequent decisions, (*Johnson v. Hunt*, 23 *Wend.* 87,) would seem to be conclusive upon the question whether our courts will recognize or enforce a right or title acquired under a foreign bankrupt law or foreign bankrupt judicial proceedings.

The case of *Abraham v. Plestoro* was certainly very broad in its repudiation of foreign bankrupt proceedings, and went much further than the case of *Holmes v. Remsen*, (20 *John.* 229;) but I think it must be deemed conclusive authority for saying that had the defendant raised the question by demurrer, or on the trial, it must have been held that the plaintiffs could not maintain this action.

The complaint shows that the assignment or transfer under which the plaintiffs claim, was not a *voluntary* assignment or transfer, but was an assignment or transfer made under or by force of a judicial proceeding or decree. But the defendant did not raise the question, by demurrer, nor on the trial. The record of judgment before us does not show that any such objection was taken on the trial, nor indeed any of the proceedings on the trial, except the rendering of the verdict.

Can the defendant, then, present the question to the general term by this appeal, when we must assume that he sat

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silent at the circuit, and permit the trial to go on, and end in a verdict against him, without raising the question? I think he cannot. (*See Pope v. Dinsmore*, 8 *Abbott's Pr. Rep.* 429.)

If the question should be looked upon rather as a question of jurisdiction, than of title, yet the defendant by his silence could waive the question of jurisdiction.

The defendant was not compelled to raise the question by demurrer. He could have done so at the trial; but it will not do to let him sit silent at the trial, and raise the question for the first time on appeal.

In my opinion the judgment should be affirmed with costs.

ALLEN, J. concurred.

CLERKE, P. J. I concur, except that I do not think the defendant could raise the question at the trial, after having failed to demur. If he demurred, it should be under sub. 2 of sec. 144 of the code; but sec. 148 says, if the objection is not taken by demurrer, (or answer,) the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, (under sub. 1 of § 144,) and the objection that the complaint does not state facts sufficient to constitute a cause of action (under sub. 6 of § 144.)

Judgment affirmed, with costs.

[NEW YORK GENERAL TERM, February 4, 1861. *Clerke, Allen and Sutherland*, Justices.]

THE PEOPLE, on the relation of McSpedon & Baker, *vs.*
HAWES, Comptroller of the city of New York.

34 69
36 61
42 553
53 567
5L 35
36h 266

Whether the legislature had, or had not, the constitutional power, originally, to appoint the commissioners of records for the city and county of New York, under whose direction and superintendence certain work has been done, yet the work having been performed, and the legislature determining that the same was a service rendered to the county, they had the right to tax that portion of the state to pay for it.

Although the legislature cannot authorize the taking of the property of an individual, for public purposes, without compensation, or for private purposes with or without compensation, yet it has the absolute power to determine what sums shall be raised by taxation, and the purposes to which they shall be applied.

It can apportion the public burthens among all the tax paying citizens of the state, or among those of a particular section or territorial division.

Where the legislature has deemed it proper to determine that certain work performed by individuals, for a county, is for the public good, and, without any reference to the mode by which they are authorized to enter upon the performance of the work, it has enacted that they shall receive compensation for it, and has taxed the inhabitants of the county for that purpose, it is not a ground of objection that the legislature has not declared the precise amount of the claim, if it has specified a maximum amount of compensation, and has indicated the method by which the actual amount due shall be ascertained.

The legislature, by the 6th section of the act of April 17, 1860, empowered the board of supervisors of the county of New York to cause to be raised and collected a sum not exceeding \$80,000, to meet and pay whatever sum, up to that amount, might be found due to the contractors with the commissioners of records; and authorized the comptroller "to pay said amount when the same" should "be judicially determined." *Held* 1. That the legislature did not intend, by the terms "*judicial determination*," a determination by *action* commenced against the board of supervisors, and a judgment recovered in it, before the comptroller should pay the amount; inasmuch as such a remedy did not exist, in favor of the contractors.

2. That the contractors could have no judicial determination, except in a proceeding by mandamus; and that in the absence of any specific directions in the act, as to the manner of that determination, it would be unreasonable to infer that any other mode was intended than that attainable by mandamus.
3. That the proper remedy of the contractors, upon the refusal of the comptroller to pay them the amount certified by the commissioners of records to be due to them, was by mandamus.

There can be an appeal only from a *final judgment*.

Whenever a case is referred, at a special term, even when the order of refer-

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ence settles all the essential points at issue, it is nothing but an interlocutory order; and no *final* judgment can be entered until the coming in of the report. If the party appeals from the order of reference, the appeal will be dismissed.

ON the 13th of April, 1855, the legislature passed an act appointing commissioners to arrange the public records in New York, and have indexes made and printed; and providing that "the necessary expenses incurred by them shall be paid by the county treasurer, upon the certificate of said commissioners; and the supervisors of said city and county are hereby authorized to raise by tax the amount required to defray the same." (*Laws of 1855, p. 762.*) Pursuant to the statute, the commissioners, on the 15th of November, 1855, made a contract with the relators to make and print indexes of the records in the register's office. The relators entered upon the work, and have nearly completed the contract. They have received several sums in payment, which the defendants have raised in different years. The relators obtained from the commissioners, at sundry times between October, 1858, and July, 1860, certificates under the contract, amounting to \$58,957.37. On the 17th of April, 1860, the legislature passed an act, containing, among other things, a provision in the following words: "The said board of supervisors are hereby empowered to cause to be raised and collected, in manner as aforesaid, the further sum not exceeding \$80,000, to meet and pay whatever sum, up to that amount, as may be found due to the contractors with the commissioners of records of the city and county of New York. *The comptroller is authorized to pay said amount when the same shall be judicially determined.*" On the 22d of May, 1860, the commissioners of records certified to the comptroller and the board of supervisors, that there was due to the contractors, for work under said act of 1855, the sums of \$65,873.51, \$1953, \$1645.43, and \$2562.32, and required said board of supervisors to cause said sums to be raised, pursuant to the said acts of 1855 and 1860, which the board

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of supervisors, up to the 26th of July, 1860, neglected and refused to raise.

Whereupon such proceedings were had, that on the 10th day of September, 1860, a mandamus issued out of this court, commanding the supervisors to raise said sums of money as in said acts specified. And thereupon the said supervisors raised the sum of \$72,000 for that purpose, which has been collected. On the 14th day of November, 1860, the certificates obtained by the relators from the commissioners of records, pursuant to the contract, were presented to the defendant, as comptroller of the city, and he was requested to draw his warrant for the same, but refused to do so, and gave, as his only reason for such refusal, that the same had not been judicially determined. Thereupon a motion was made for a mandamus, commanding him to draw his warrant. Judge Sutherland, at special term, made an order granting the motion, and adjudging that the *judicial determination*, mentioned in the 6th section of the act of April 17, 1860, could properly be had in this proceeding. The order also referred the matter to Hon. B. W. Bonney, to ascertain and report whether the amount claimed by the relators, and demanded of the comptroller, was actually due and owing to them for services actually performed under a contract or contracts made with the commissioners of records for the city and county of New York, as stated in the papers on which they applied for said writ of mandamus. The order also provided that upon the coming in and confirmation or modification of the report, a peremptory writ of mandamus issue, &c. From which order the defendant appealed to the general term.

Greene C. Bronson, A. R. Lawrence, Jr. and H. H. Anderson, for the appellants. I. This application is based upon the provisions of the act of April 17th, 1860, entitled "An act to enable the supervisors of the county of New York to raise money by tax." (*Laws of 1860, p. 1024, § 6.*) And

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to entitle the relators to a mandamus, they must show that, under the provisions of that act, it was the *duty* of the appellant, at the time of the demand referred to in the relators' affidavit, to draw his warrant in favor of the relators for the amounts in said affidavit mentioned. (1.) The meaning of the sixth section of the act of April 17, 1860, was determined by this court in the case of the *People ex rel. Wetmore and others, commissioners of records, v. The Board of Supervisors*, (11 *Abbott*, 114.) In that case the court held that the words "when the same shall be judicially determined," as used in the sixth section of that act, "must be held to refer to the judicial determination of the constitutionality of the act of April 13th, 1855, (the act creating the commissioners of records,) or, at all events, to the judicial determination of some question or questions other than as to the *amount* due for work done under the contracts." (*Opinion of Sutherland, J.*, 11 *Abbott*, 118.) It is then incumbent on the relators to show that such determination had been had at the time the demand aforesaid was made.

II. There has been *no judicial determination* of the matters required by the act of April 17th, 1860, to be judicially determined, before the comptroller of the city of New York should be authorized or obliged to pay any amount on contracts made by the commissioners of records. (1.) There is no pretense, in the affidavit of the relators, that there has been any judicial determination of those matters. (2.) And it distinctly appears that the respondent places his refusal to comply with the demands of the relators upon the ground that such judicial determination has not been had.

III. The remedy by mandamus is a purely legal remedy, and a party is not entitled thereto, unless he has a *clear legal right* to demand what is asked for in his writ. (*People v. Suprs. of Chenango Co.*, 1 *Kernan*, 563. *People v. Canal Board*, 13 *Barb.* 444. *People v. Suprs. of Greene Co.*, 12 *id.* 217. *People v. Corp. of Brooklyn*, 1 *Wend.* 324. *Crary on Spec. Proceedings*, 272.) (1.) As has been above shown,

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there is *no duty* imposed upon the appellant, as comptroller, to pay any amount on contracts made by the commissioners of records, *until the judicial determination* contemplated by the act of 1860 has been had; and it follows, of course, that the relators have *no legal right* to demand such payment in the absence of such a determination.

IV. Neither can it be said that the relators can obtain the judicial determination contemplated by the act of 1860, and a payment by the respondent of their alleged claim in the same proceeding, for these reasons: (1.) The act of 1860 peremptorily provides that the judicial determination shall be complete and final, before the duty of the comptroller shall attach. (*Laws of 1860, ch. 509.*) (2.) The right to a mandamus must be in esse at the time the proceedings to obtain the writ are initiated, and therefore it is impossible in one and the same proceeding to *establish the right and enforce it*. (*See remarks of Savage, Ch. J., in People v. Corporation of Brooklyn, 1 Wend. 324.*) (3.) It being clear that the judicial determination, under the act of 1860, must precede the obligation of the comptroller to pay, it follows that the respondents had no legal right to demand that the appellant should draw his warrant for the sum in question, until such judicial determination had been had. It is an elementary rule, that a mandamus will not be granted unless the application has been preceded by a distinct demand of the specific thing to compel the performance of which is the object of the mandamus, and by a refusal of performance or conduct equivalent to it. (*2 Ad. & Ellis, 477. 3 id. 217.*) Now, as it appears that the respondents were not authorized to make such a demand, at or prior to the time when this proceeding was initiated, the court was not authorized to make the order at the special term.

V. The order of January 18th, 1861, was improperly granted. (1.) The court has no power to order a reference in a proceeding to obtain a mandamus. The provisions of the code in relation to referring actions are not applicable to

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proceedings of this nature. (*Code*, § 471.) (2.) There can be found no authority in any book of practice for such an order, and it is entirely antagonistic to the elementary principle in reference to mandamus, that the right to the writ should be complete and perfect at the time it is applied for. (3.) If the order in question was properly granted, this result will follow—every contractor who has a claim against the corporation of the city, instead of bringing an ordinary action upon his contract, will be enabled to apply for a mandamus, and then obtain a reference to settle whether any thing is due upon that contract, and, on the coming in of the referee's report, will be entitled to a peremptory writ for the payment of such claim.

VI. The question whether the commissioners of records are a legally organized body, arises in this proceeding, for these reasons: 1. The sixth section of the act of 1860 does not command the comptroller to pay any sum to the contractors with the commissioners of records, but only such sum as may be found *due*. 2. The question whether any amount is due, involves the question whether the commissioners of records have any legal existence; for, if they have not such existence, they could neither contract a debt for themselves, nor for the county. 3. The case of the *Town of Guilford v. The Supervisors of Chenango Co.*, (3 *Kernan*, 143,) referred to in the opinion at the special term, does not affect the position above taken, because in that case the supervisors were imperatively commanded to raise a specific sum, not such a sum as might be found due.

VII. The act of April 13th, 1855, is unconstitutional, for the reason that the legislature had no power to *appoint* the commissioners of records.

J. W. Edmonds and *J. T. Brady*, for the relators. I. The act of 1860 is imperative upon the defendants. The words "to authorize," mean "must," or "shall," because public interest or rights are concerned; and because the public or

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third persons have a claim *de jure* that the power shall be exercised. (1 *Kent's Com.* 5th ed. 467, note d. *Newburgh Turnpike Co. v. Miller*, 5 *John. Ch.* 113. *Rex v. Barlow*, 2 *Salk.* 609. *Backwell's case*, 1 *Vern.* 152. *Malcolm v. Rogers*, 5 *Cowen*, 193. *Minor v. Mich. Bank*, 1 *Peters*, 64. *People v. Westchester*, 12 *Barb.* 452. *Regina v. Tithe Commissioners*, 14 *Q. B.* 474.)

II. The act of 1855, under which the contract was made, is not unconstitutional. (*People v. Draper*, 15 *N. Y. Rep.* 532. *Per Harris, J. at special term, in Central Park case.*)

III. Even if the act is unconstitutional, it certainly is constitutional and competent for the legislature to direct the board of supervisors to raise money to defray the expense of preserving the county records.

IV. The comptroller having put his refusal to draw his warrant on the single ground that there had been no judicial determination, he is now precluded from raising any other objections, and therefore the only question raised on this appeal, is that growing out of a judicial determination.

V. It was competent for the court, on an application for a mandamus, judicially to determine whether any thing, and what was due to the relators; and that, either by direct action of the court, or through the intervention of any of its officers. (*Judiciary act of 1847. Laws of 1847, p. 344, § 77. 2 R. S. 383, § 39. Laws of 1845, chap. 163, § 3.*)

VI. The object of the act of 1860 was to remove all questions as to the constitutionality of the act of 1855, and the validity of the contract made in pursuance of it, and to have the relators compensated for money actually earned by them in the performance of the contract; and there is no other mode in which that purpose can be carried into effect than by a writ of mandamus, and a judicial determination therein of the amount thus earned by them. *Ubi jus ibi remedium.*

By the Court, CLERKE, P. J. I. The position taken by the counsel for the defendant, in his 7th point, is disposed of

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by the act of April 17, 1860, authorizing the supervisors of the county of New York to raise money by tax for city and county purposes. By the 6th section of this act they are empowered to raise and collect, in addition to the ordinary taxation, the further sum not exceeding \$80,000, to meet and pay whatever sum up to that amount may be found due to the contractors with the commissioners of records. Whether the legislature had, or had not, the constitutional power, originally, to appoint the commissioners of records, under whose direction and superintendence the work was done, yet the work having been done, and the legislature determining that the work was a service rendered to the county, they had the right to tax the inhabitants of that portion of the state to pay for it. Although it cannot authorize the taking of the property of an individual for public purposes without compensation, or for private purposes with or without compensation, yet it has the absolute power to determine what sums shall be raised by taxation, and the purposes to which they shall be applied. It can make appropriations of money whenever the public well being requires ; and of this it alone is the sole judge. It can apportion the public burthens among all the tax paying citizens of the state, or among those of a particular section or territorial division. (*Town of Guilford v. Supervisors of Chenango County*, 3 Kernan, 143. *The People v. The Mayor &c. of Brooklyn*, 4 Comst. 419.)

In the present case, the legislature has deemed it proper to determine that the work performed by the relators for the county is for the public good, and, without any reference to the mode by which they were authorized to enter upon the performance of this work, it has enacted that they shall receive compensation for it, and has taxed the inhabitants of this division of the state for that purpose. It is no objection to this that the legislature has not declared the precise amount of the claim ; being ignorant of the exact value of the service, the act specifies a maximum amount beyond which the relator shall receive nothing, at least in this way, for the serv-

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ices already rendered ; and it indicates the method by which the actual amount due shall be ascertained. This the legislature has as much authority to do as to specify the exact sum absolutely, in the first instance ; and, in neither case have the courts power to supervise or review the action of that branch of the government.

II. The only question, then, which remains, arises on the interpretation of the last sentence of the section to which I have referred. It authorizes the comptroller to pay the amount when it shall be *judicially determined*. Does this require that an ordinary action shall be commenced against the board of supervisors, and a judgment recovered in it, before the comptroller shall pay any amount ; or shall the amount be determined in any way which the court may deem expedient ?

What the legislature intended by this phrase, can only be ascertained by considering what was the legal method of enforcing claims of this nature against the board of supervisors at the time the act of 1860 was passed. If the remedy by an ordinary action could be sustained, it would be reasonable to suppose that the legislature intended that this method of judicial determination should be adopted ; otherwise, if the only method by which redress could be obtained was by the extraordinary remedy by a writ of mandamus, it is fair to assume that the judicial determination may be provided for under the proceeding in that writ, in such a manner as the court entertaining the proceedings may deem most convenient and conducive to the end contemplated by the legislature. All constitutional questions as to the appointment of the commissioners, all questions relating to the utility of the work ; in short, all questions as to the meritorious nature of the claim being disposed of by that body in its sovereign capacity, the only remaining subject of inquiry was the precise amount of that claim, which it left to be determined by some other tribunal.

Nothing is better established than that, generally, a writ

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of mandamus will not lie, where an adequate remedy by action exists.

The writ of mandamus is a high prerogative writ, of which the remedial power is most effective and most extensive. It was devised to supply a defect in the administration of justice. It is directed to any natural person, corporation, or inferior court of judicature, requiring them to do some specific thing which the supreme court has resolved it is their peculiar office and duty to do. It lies to compel the admission or restoration of the party applying, to any office or franchise of a public nature. It lies for the production, inspection, or delivery of public books or papers, for the surrender of the *regalia* of a corporation; to oblige bodies corporate to affix their common seal; to compel the holding of a court; and for an infinite number of other purposes, which it is impossible minutely to recite. (3 *Black.* 110.) In some cases this writ may be issued where the injured party has another more tedious method of redress, as in the case of admission or restitution to an office. Where, however, the party has a complete and specific redress at law, the circumstance of its being a more tedious method will not be sufficient to warrant the court in granting a *mandamus*. There must be not only a specific legal right, but generally the want of a specific legal remedy, in order to found an application for this writ. (*Lord Ellenborough*, 8 *East*, 219.) But it will never be granted where there is a plain and adequate remedy by action, for the party aggrieved. (*Ex parte Lynch*, 2 *Hill*, 45.) But, in the present case, had the relators a remedy by action? The revised statutes very amply and specifically provide for the cases in which supervisors, boards of supervisors, and counties, may be sued. (1 *R. S.* 384, *mar.*; 377, *mar.* 2 *id.* 473, *mar.*) According to these provisions the counties may be sued for certain claims, or in respect of certain causes of action or controversies, but not for every claim, cause of action, or controversy. I agree entirely with the views presented by Mr. Justice Oakley in *Brady v. The Supervisors of New York*,

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(2 *Sand. S. C. Rep.* 460,) that “those sections of the revised statutes were intended to provide a remedy against a county for such causes of action (and no other) as could not be presented to and examined and allowed by the board of supervisors *as county charges*. But every claim, which is a county charge, is to be audited and allowed by the board of supervisors, who are a judicial body, constituted by law to decide on all matters of account between individuals and the public body composing the county, which they represent.” “The statute virtually makes the boards a court of arbitration, to which all parties having claims against their respective counties, other than those of the indefinite kind before referred to, must submit such claims for examination, audit, and allowance.” The opinion, which I have quoted, shows that all the cases establish the general principle that wherever services have been rendered, which are beneficial to a county, and no specific compensation is provided for the same by law, they shall be deemed contingent charges against the county. Of the allowance of such charges the board of supervisors, as we have seen, is the sole judge; unless the supreme legislature itself should allow and provide for it, as in the present case.

The relators, then, had no remedy by action; and the only remedy, to which they could resort for redress, was the writ of mandamus. The legislature could not, therefore, have intended by the terms “*judicial determination*,” a determination by action; because such a remedy did not exist in favor of the relators. The relators could have had no judicial determination, except in a proceeding of this nature; and in the absence of any specific direction in the act, as to the manner of this determination, it would be unreasonable to infer that any other mode was intended than that which the court, where the proceedings by mandamus were pending, may deem expedient.

We are, therefore, unanimously of opinion that the remedy adopted by the relators is the proper one, and that the decision of the special term is correct.

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But as we find that the decision appealed from is not, strictly speaking, a *final* judgment, although it decides the merits of the controversy, we must dismiss the appeal, instead of affirming the judgment. Wherever a case is referred by the special term, even when it settles in its order all the essential points at issue, it is nothing but an interlocutory order, and no *final* judgment can be entered until the coming in of the report. There can be an appeal only from a final judgment.

Appeal dismissed, with costs.

[NEW YORK GENERAL TERM, February 4, 1861. *Clerke, Sutherland and Allen, Justices.*]

MCCREADY and others vs. WOODHULL and others.

Each owner of a ship has a distinct and separate interest as a tenant in common; and may or may not insure his particular share, as he thinks fit.

He is under no obligation to insure for the benefit of the others, or to unite with them in insuring.

If he gives authority to an agent, to insure for him, it necessarily means to insure his share; and in order to make him liable jointly with the other owners for a premium on a policy for the whole vessel, the proof must be clear that he gave express authority for that purpose.

Such authority cannot be inferred from the general powers of a ship's husband; it not being a part of his general duty to insure.

If he does this, it must be by a special authority. Instructions from all the owners, to insure, will only authorize him to insure for each separately, to the value of his separate interest.

To make them all liable jointly, each for the other, they must enter into a joint undertaking to that effect, knowingly and expressly.

A PPEAL from a judgment entered upon the report of a referee. The defendants were the owners of the schooner *S. N. Smith*; the defendant Smith owning one-fourth, and each of the other defendants one-eighth; the whole vessel valued at \$5500. The plaintiffs were shipping and commission merchants, and in 1854 and 1855 were acting as agents

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of the schooner above named, being constituted such agents by the defendant Smith and one Justus Ryder, some time captain. In August or September, 1854, the plaintiffs procured a renewal of a policy of insurance on said schooner, in the Reliance Insurance Company, for one year from August 30th, 1854, for \$2500. In January or March, 1855, the plaintiffs effected or obtained a policy of insurance on said schooner, in the Atlas Insurance Company, for one year from January 19th, 1855, for \$3000. In February, 1855, the plaintiffs effected an insurance on said schooner, in the Astor Insurance Company, for one year from February 20th, 1855, for \$2500. This last insurance was based upon the fact that the Reliance Insurance Company failed when the policy first above mentioned had run for *six months*, whereupon the plaintiffs canceled that policy and effected a new one for *one year*, without express authority or direction from any one. This action was brought to recover of the defendants, as joint owners of the vessel, a balance claimed to be due to the plaintiffs on account of advances made by them in effecting insurances upon the ship, &c. The complaint alleged that at the times therein mentioned the plaintiffs, at the instance and request of the defendants, paid out and disbursed for the use and benefit of the schooner S. N. Smith, various sums stated, amounting to \$1052.24. That they have received only \$158.11; that the defendants were owners of said schooner, and were indebted to the plaintiffs in the balance of said account, \$894.13. The answer denied the allegations of the complaint, except that the defendants were owners, and alleged that Smith and Klotts had paid the plaintiffs large sums of money for insurance, &c. The last item of the plaintiffs' demand, i. e. balance of interest, was unproven and unexplained. Excepting Woodhull, none of the appellants ever dealt with or saw the plaintiffs, or employed them to do any thing. None of the policies were ever in the possession of the appellants or either of them, nor ever seen by them or

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either of them, nor did the name of either of the appellants ever appear in them. The defendant Conklin never requested any one to effect insurance on his share or interest.

The referee found, as facts, that the plaintiffs did, acting as agents, effect and procure the several policies of insurance upon the schooner S. N. Smith, and for the several amounts and periods, and paid therefor the several premiums in the complaint stated ; and that they did and performed services in and about the obtaining of such insurances, and that for such services, and for effecting such insurances, and advancing the necessary moneys for the payment of said premiums, the plaintiffs became entitled to the commissions specified in the complaint. That the defendants were the owners of the schooner ; and that the defendant Samuel N. Smith owned the one equal undivided fourth part thereof, and that each of the said other defendants owned the one equal undivided eighth part thereof. That in procuring and effecting the said several insurances, and in doing and performing the said services, the plaintiffs acted upon the instance and request, and by the employment and authority, of all the defendants except William Conklin.

And the referee found, as conclusions of law, that the plaintiffs were entitled to recover of and from the defendants, excepting Conklin, the sum of \$894.13, together with interest. He accordingly directed the entry of judgment in favor of the plaintiffs against the defendants last named for that sum, with costs, and directed the complaint to be dismissed as to the defendant Conklin. The defendants Woodhull, Havens, Howell and Hudson appealed.

N. B. Hoxie, for the appellants.

Jenness & Watson, for the respondents. •

CLERKE, J. Each owner of a ship has a distinct and separate interest as a tenant in common ; and each owner may,

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or may not, as he deems fit, insure his particular share. He is under no obligation whatever to insure for the benefit of the others, or to unite with them in a joint act to do so, so as to become liable for the whole premium, if the others should neglect or be unable to pay it. If he gives authority to any agent to insure for him, it necessarily means to insure his share; and in order to make him liable jointly with the other owners for the premium on a policy for the whole vessel, the proof must be clear that he gave express authority, to subject him to such a liability. This certainly cannot be inferred from the general authority of the ship's husband; whose duties are restricted to providing a proper outfit for the vessel, to see that she is properly repaired and fitted for the voyage, and furnished with provisions and sea stores, &c. But it is not a part of his general duty to insure; if he does this, it must be by a special authority. If he obtains instructions from every one of the owners, he has only authority to insure for each separately to the value of his separate interest; to make them all liable jointly, each for the other, they must enter into a joint undertaking to that effect, knowingly and expressly.

Giving the testimony in this case all reasonable effect in favor of the plaintiffs, the most that can be fairly deduced from it is, that some of the defendants authorized the captain to insure for the particular share of each. Nothing satisfactory appears in it to show that they intended to make themselves jointly liable for the whole. The defendants had no joint interest in the insurance, and, therefore, no joint liability in relation to it; unless, as I have said, they voluntarily incurred it. I do not think the referee had any ground for concluding that they had done this.

The judgment should be reversed and a new trial ordered; costs to abide the event.

SUTHERLAND, J. concurred.

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INGRAHAM, J. (dissenting.) The grounds on which this appeal was taken related to a question of fact. Upon this question there was conflicting testimony, sufficient to have sustained the finding of the referee as to the joint liability; and under such a state of facts I do not think we should interfere with the finding.

It is conceded that the referee erred as to the amount, as his report includes a portion which had been paid by two of the owners. That amount, with interest, should be remitted, and the judgment affirmed for the residue.

New trial granted.

[NEW YORK GENERAL TERM, February 4, 1861. *Clerke, Sutherland and Ingraham, Justices.*]

 KAYSER & WEIGAND vs. M. & S. SICHEL.

Upon an answer setting up the non-joinder of other persons as co-defendants, articles of copartnership are admissible to prove a partnership between the defendants and the persons omitted.

But where the answer alleged that two persons not joined were partners of the defendants, and the articles produced showed that there was only one partner not joined, it was *held* that the articles were properly excluded.

Where vendees have been guilty of a fraud, upon a purchase of goods on credit, the vendor may, without waiting until the time of credit has expired, reclaim the goods, or he may waive the tort and recover in assumpsit for the value.

In the latter case, it is sufficient for him to allege, in his complaint, that he sold to the defendant goods to the value of so much, and that the defendant has not paid, &c.

A party to an instrument under seal, having a subscribing witness, is not a competent witness to prove its execution. *Per CLERKE, J.*

To lay the foundation for the admission of any other evidence than that of the subscribing witness, it is necessary to prove that the latter was not capable of being examined, as that he was dead, or incompetent to give evidence from insanity or infamy of character, or absence in a foreign country, or that he could not be found, after strict and diligent inquiry. *Per CLERKE, J.*

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THIS action was brought against two of the members of the firm of Max Sichel & Co., to recover the sum of \$1108.21 and interest, upon an alleged indebtedness for leather sold and delivered to the firm between July 30th, 1858, and September 14th, 1858. The answer set up; first, the non-joinder of George Mann and Adolphus Knorr, as co-defendants; and second, that the goods had been purchased on a credit which had not expired, and that in payment the defendants had executed and delivered to the plaintiffs their promissory notes therefor. The complaint originally contained a count claiming that such promissory notes had been received under fraudulent representations by the defendants, as to their responsibility; and had been tendered back before suit, but on the defendants' motion that count was stricken out before answer. The case was tried before his honor, Judge DAVIES, without a jury, at the New York circuit, on the 21st day of January, 1859. On the trial the defendants produced the articles of copartnership between the persons constituting the firm of Max Sichel & Co., and offered to show by them that George Mann was a partner. The plaintiffs' counsel objected to the articles as evidence, and the court excluded the same. The defendants then offered to prove by Adolphus Knorr the execution of a release, signed by said Knorr and Max Sichel. The following is a copy of such release:

"Whereas, we the subscribers having heretofore been in copartnership in the shoe and leather business in the city of New York, at 190 William street in said city; and whereas said copartnership under the name of Max Sichel & Co. having been dissolved by mutual consent between the respective parties hereto; now, in consideration of the sum of one dollar to each other in hand paid, the receipt whereof is hereby acknowledged, do hereby each for himself release and discharge each other from all and every claim or demand that we or either of us have against each other anterior to the date of this agreement.

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In witness whereof we have interchangeably set our hands and seals this seventh day of October, 1858.

MAX SICHEL, [L. S.]

A. KNORR, [L. S.]

Sealed and delivered in presence of John Herts."

The plaintiffs' counsel objected, and his honor, the judge, sustained the objection, and held that the execution of such release should be proved by the subscribing witness if within the state, to which ruling the defendants' counsel excepted.

The justice before whom the action was tried found the following facts, viz: That the plaintiffs, as copartners under the firm name of Henry L. Kayser & Co., at the city of New York, and between the thirtieth day of July, 1858, and the fourteenth day of September, 1858, sold and delivered to the defendants, who then were copartners under the firm name of Max Sichel & Co., goods, wares and merchandise, consisting of leather, to the amount and of the reasonable value in all of \$1008.21 ; and that said sum, with interest amounting to \$25.91, still remains due and unpaid. That said goods were so sold and delivered upon a credit of four months ; that such credit was obtained upon false representations for that purpose made by said defendants as to their responsibility. That the defendants gave the plaintiffs their promissory notes, by them made in accordance with such credit, and which notes were received upon the faith of said representations. That such representations of the defendants as to their responsibility were wholly untrue and known to said defendants to be so at the time of making the same, and that prior to the commencement of this action the plaintiff offered to surrender to the defendants said promissory notes. And as matter of law upon said facts, he found that the plaintiffs were entitled to rescind the contract as to the credit, by reason of the false representations made to obtain the same, and were, therefore, entitled to judgment for the sum of \$1135.57, besides costs.

Judgment was entered for the plaintiffs accordingly. No

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exceptions were taken to the judge's finding of facts or conclusions of law, and the case came up on exceptions specifically taken at the trial.

E. W. Dodge, for the appellants

W. B. Stafford, for the plaintiffs.

INGRAHAM, J. In this case the defendants were sued as partners, for the amount of a bill of goods sold them. In the answer the defendants set up as a defense that one Mann and one Knorr were partners in the transaction, and should have been joined as defendants.

Upon the trial of the cause the defendants offered articles of copartnership between the defendants and Mann, dated previous to the sale of the goods, and proved by a subscribing witness, which were objected to and excluded. The evidence did not show that Knorr was a partner. The articles of copartnership were admissible to prove a partnership. Where the members of a firm or any of them set up by way of defense that other persons than those sued were partners, they are held to strict proof of the existence of such partnership. The admissions of the parties not joined is not admissible, nor would the admissions of the defendants be received for such purpose.

The only evidence that could be produced is the articles of copartnership, unless the defendants themselves are examined. This rule was stated by the court in *Sweeting & White v. Turner*, (10 *John*. 216,) in which it is said "If the defendant and McNeil were partners they might have shown it by the production of the articles of copartnership, or by witnesses to the agreement."

I am, however, of opinion that the exclusion of the evidence may be sustained. The answer set up two persons not joined to have been partners. The articles produced only showed that there was one person not joined. In *Hawks v. Munger*, (2 *Hill*, 200,) Judge Cowen says: "To sustain a

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plea of non-joinder it must appear in evidence that there is neither a greater nor less number of defendants than the plea sets up." It would have been better to have received the evidence as to Mann and then ruled that it was insufficient to make out the defense as set up in the answer, without further proof as to the interest of Knorr in the firm. But as the evidence established that Knorr was not a partner, the exclusion of it worked no injury to the defendant.

The other question is as to the right of the plaintiff to recover notwithstanding the credit which was given on the sale of the goods had not expired when the action was brought. The plaintiffs claimed to recover upon the ground that the defendants had been guilty of a fraud in the purchase of the goods from them. The finding of the court sustains the allegation in that respect, and the plaintiffs might, therefore, have reclaimed the goods, or might have waived the tort and recovered in assumpsit for the value. The complaint charges that the plaintiffs sold to the defendants goods to the value of so much and that the defendants have not paid, &c. This question is fully discussed in *Roth and others v. Palmer*, (27 Barb. 652,) and it is unnecessary to add any thing to the opinion in that case.

The judgment should be affirmed.

SUTHERLAND, J. concurred.

CLERKE, P. J. I. The judge, at the trial, properly refused to allow the defendants to show by written articles that Mann was a copartner of theirs, at the time their liability to the plaintiffs was incurred. The answer averred a copartnership with Mann and Knorr, and not with Mann alone. The instrument, therefore, had no relevancy to the question raised by the pleadings. Whether it would have been proper to have admitted it, if the answer had averred the partnership of Mann alone, it is not necessary for us now to decide. It appears from the opinion of the old supreme court

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in *Sweating v. Turner*, (10 John. 216,) that the articles of copartnership were admissible in a plea of this description. But this was a *dictum*; it was not at all necessary to the decision of the case to determine that the written declarations of the defendants were admissible in their own favor, when their oral declarations confessedly could not be.

II. Knorr, one of the parties to the release, was not a competent witness to prove its dissolution. To lay the foundation for the admission of any other evidence than that of the subscribing witness, it was necessary to prove that the latter was not capable of being examined, as that he was dead, or incompetent to give evidence, from insanity or infamy of character, or absent in a foreign country, or that he could not be found after strict and diligent inquiry. This rule has not not been directly or indirectly repealed or modified by the code, or any other legislative provision.

Even if the execution of this release were properly proved, the instrument was not relevant. It expressly contradicted the allegation in the answer that Mann and Knorr both were partners.

III. The plaintiffs were not bound to bring an action of *tort* for the fraud. It was sufficient to sue generally for the sale and delivery of the goods, and when the defendants showed that they were sold on a credit, which had not yet expired, the plaintiffs in reply could show that this credit was obtained by fraudulent representations: that, consequently, they rescinded this particular express contract, and that they relied for recovery on the contract which the law in such cases implies, namely, that the defendants are liable for immediate payment, precisely as if no express contract had ever been made. This, I think, is fully established by all the recent adjudications in our courts, particularly in the cases of *Roth v. Palmer*, and *Tobey v. Palmer*, (27 Barb. 652;) where the subject is thoroughly discussed. The bringing of the action, and the offer at the trial to surrender and

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cancel the notes, were a sufficient exercise of the plaintiffs' right to rescind the express contract.

The judgment should be affirmed with costs.

Judgment affirmed.

[NEW YORK GENERAL TERM, February 4, 1861. *Clerke, Sutherland and Ingraham*, Justices.]

BARNARD vs. MONNOT.

Although a broker's compensation is earned on the completion of his service, which terminates when the vendor and vendee have *agreed*, yet there must be an agreement by which the parties are legally bound.

On a negotiation for the sale of real estate the parties must agree upon the terms, and the contract must be formally reduced to writing and executed by them, before the broker will be entitled to his commissions.

Where a negotiation, conducted by a broker, is broken off before any binding agreement is entered into between the parties, and thereupon a new contract is executed by them for a part of the property, only, and varying essentially in its terms, from the first, without any agency or intervention of the broker, the latter will not be entitled to a commission.

THIS is an appeal brought by the plaintiff, from a judgment of this court dismissing the complaint, rendered at a trial term thereof, held by Hon. WILLIAM F. ALLEN, on the 8th day of March, 1859. The complaint alleges a *retainer* of the plaintiff as a real estate broker, by the defendant, to negotiate the sale of the large block of ground bounded on the Fifth avenue, Twenty-third and Twenty-fourth streets, in the city of New York, known as the Hippodrome property. That on the 31st *May*, 1855, the defendant and a purchaser met at the plaintiff's office, and the defendant *agreed* to sell, and the purchaser to buy, the whole property for \$250,000. That the purchaser was ready to execute a written contract, but the defendant *refused*, but in consequence of that negotiation the defendant, on the 9th of June, 1855, executed to the same purchaser a written contract for part of the prop-

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erty for \$170,000, and on the 15th June a deed was delivered for such part. That upon such negotiation the usual customary brokers' commission for selling real estate became due to the plaintiff, one per cent upon the price, and demands \$2500, with interest from 31st May, 1855. The answer denies that the defendant employed the plaintiff as his broker, or that he ever negotiated, as his broker, any sale, and denies that on the 31st May he agreed to sell, as in the complaint stated; and alleges that the alleged sale was *merely a negotiation*; that the minds of the parties never met therein. Denies that from any intervention or services of the plaintiff, the defendant made a sale of *part* of the property, but that that sale was made without any intervention or services of the plaintiff, and was founded upon different considerations and terms from the first negotiation. The evidence tended to show that the plaintiff was never retained by the defendant, who was a perfect stranger to him, and the defendant had his own broker to sell the property for him, a Mr. Goodspeed. But that the plaintiff sent for the defendant, writing and sending him letters, and spoke and acted as if he was applying to purchase on his own behalf, or *as broker for Mr. Eno*, his landlord, for whom he had acted largely as broker, and so the defendant was led to believe. On the 31st May, Eno, the purchaser, and the defendant, met at the plaintiff's office, and entered into a preliminary agreement as to the price, provided the defendant was satisfied, upon investigation, that the value which Mr. Eno set upon the property he gave in exchange was fair, and that the leases on it were satisfactory. The defendant had never seen the deeds of the property he was to receive, knew nothing of the dimensions of the lots, had never seen the leases, which turned out to be very complicated and with objectionable provisions in them; the defendant therefore refused to commit himself by a written contract, until he and his lawyer, Mr. Logan, had satisfied themselves as to those matters. On inquiry, the defendant

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ascertained that the property, 74 Broadway, which he was to receive as \$110,000 in part payment, was over-valued \$10,000, of which neither Mr. Eno nor the plaintiff had informed him, and the defendant's wife refused to accede to the sale. There were also objectionable clauses in the leases. For these reasons the defendant refused to complete the negotiation or to sell, and no valid agreement for sale, *in writing*, was made, nor did the *parties' minds ever meet* in the details of negotiation by parol. *After* the negotiation *was ended*, and the parol agreement was declared off, a new negotiation commenced between Mr. Eno and the defendant for part of the property, without not only the agency or intervention, but without the knowledge of the plaintiff. A contract, having no element in common with the first negotiation, but entirely different, was then executed between said Eno and the defendant. The first negotiation was for the whole property for \$250,000, for which Mr. Eno was to pay by selling him 555 Broadway, at \$120,000, 74 Broadway at \$110,000, and \$20,000 cash. The second negotiation, and the contract executed under the same, was for *part* of the property at \$170,000, for which Eno gave the defendant No. 74 Broadway for \$100,000, (\$10,000 less than the first negotiation.) Mr. Eno was to assume a mortgage of \$80,000 on the property he bought of the defendant. Eno agreed to lend the defendant \$50,000, and the defendant was to give Eno a bond and mortgage on 74 Broadway for \$60,000, with other special provisions, showing that the two negotiations *were entirely different*.

H. Barnard, for the appellant.

E. Logan, for the respondent.

By the Court, CLERKE, P. J. It appears to me very evident that the plaintiff had no agency whatever in negotiating

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the second agreement effected between the defendant and Eno. It was essentially different from the bargain by which the latter was to give \$250,000 for the property. It was only for a portion of it; of which the consideration money was \$170,000; for which Eno gave the defendant No. 74 Broadway at a valuation of \$100,000 instead of \$110,000; Eno assuming a mortgage for \$80,000 on the property which he purchased from the defendant. He also agreed to lend the defendant \$50,000, and \$10,000 being due on the difference in the valuation of the property to be exchanged, the defendant agreed to give a bond and mortgage on 74 Broadway for \$60,000, with other special provisions. The first negotiation was for the whole property for \$250,000, for which Eno was to pay by giving the defendant 555 Broadway at \$120,000, 74 Broadway at \$110,000, and \$20,000 in cash.

It is evident, then, that the terms expressed in each negotiation would make the agreements entirely different. The first was never effectuated, so as to give it the character of a binding agreement. Undoubtedly, the broker's compensation is earned by the completion of his service, which terminates when the vendor and vendee have *agreed*. But it must be an agreement by which the parties are legally bound. Any thing less is merely loose conversation. Parties may agree upon the price, and generally upon the other terms. But many questions remain to be adjusted and investigated, and arrangements to be settled, which can never be properly provided for until the contract is formally reduced to writing; and if the owner of real estate is to be liable for a commission to a broker before the agreement is completed, in this way he may be compelled to pay a great many commissions before he finally disposes of it. He, also, may discover that the purchaser is entirely irresponsible, or that he never intended to complete the agreement, or that he kept up a feigned negotiation for some sinister purpose of his own, or to give his friend the broker a ground for recovering his commis-

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sions. Of course nothing of this kind could be predicated of this transaction ; broker, vendor and vendee having conducted the negotiation apparently with the sincere intention of completing an agreement. I only mention these supposed cases to show the necessity of perfecting the agreement, in the method required by law, before the agent should be entitled to his commission. I am, therefore, of opinion that the signing of a contract for the purchase of real property is essential before the broker has a legal right to compensation ; and for this reason, even if the plaintiff adduced testimony of his retainer by the defendant, sufficient to go to the jury, he could not recover any commissions for his agency in the first negotiation.

And with regard to the second, which, as we have seen, was a transaction totally different from the first, and which was completed so as to make it binding on the parties, the plaintiff had no agency in it whatever. Eno, the purchaser, and the plaintiff's own witness, says that the plaintiff had nothing to do with the agreement of the 9th of June, (the one reduced to writing and signed by the parties,) that it was made by him and the defendant personally ; "the plaintiff was not present and had nothing to do with it ; it was made at my office." This is not contradicted ; indeed it is not pretended by the plaintiff that he had any agency in the second negotiation, except, I suppose, so far as he maintains it was only a modification of the first, and that his services rendered in effecting that, entitled him to compensation on the agreement that was finally and legally concluded between the parties. But we have seen that although the first related to the whole property, and the second to a part of it, the transactions were entirely different.

The plaintiff, therefore, failed to make out his case ; and the judge properly dismissed the complaint.

I have not thought it necessary to inquire whether the plaintiff produced any evidence sufficient to go to the jury on the

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subject of the retainer. Even if he did, which I very much doubt, his case, for the reason above stated, would be incomplete.

The judgment should be affirmed with costs.

[NEW YORK GENERAL TERM, February 4, 1861. *Clerke, Sutherland and Ingraham, Justices.*]

COOK vs. FARREN.

The statutory proceedings for acquiring jurisdiction of absent defendants must be strictly complied with, in order to give the court jurisdiction. The jurisdiction is strictly statutory, and can only be acquired in the mode prescribed by the statute.

Where an infant defendant, at the time of the commencement of an action for partition, resided in the state of California, and an order for the service of the summons upon her, by publishing the same, was granted, upon an affidavit which did not show that the residence of the infant was unknown to the plaintiff, and could not with reasonable diligence be ascertained; *it was held* that the infant defendant was not properly served with process, so as to give a good title to a purchaser at a sale under the judgment or decree of partition.

APPEAL from an order of Judge INGRAHAM, denying a motion that a purchaser complete a purchase and sale in partition.

Mr. Arnoux, for the appellant.

Mr. Parsons, for the respondent.

By the Court, ALLEN, J. The objection to the title is that one of the infant heirs at law of the former owner and a tenant in common of the premises sold was not properly served with process. At the time of the commencement of the action she resided in California, and was, and still is, an infant under the age of twenty-one years. An order for the

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service of the summons upon her by publishing the same was made by Judge Roosevelt, upon the affidavit of the plaintiff, an aunt of the infant defendant. The order did not direct a deposit of the summons and complaint in the post office, directed to the defendant at her place of residence. The affidavit did not show, nor did it appear in any way, that the residence of the infant was unknown to the plaintiff and could not with reasonable diligence be ascertained by her. (*Code*, § 135.) The only statement in the affidavit bearing upon the question is, "that George Demphill and Josephine Demphill (the infant) reside in the state of California, but their present place of residence therein deponent is unable to state." Implying that she had known where they had resided, at one time, without its appearing that they had removed at all from such place of residence. The affidavit is entirely consistent with the fact that they had resided, within the knowledge of the deponent, at Benicia or any other given place, and still resided there, the individual making the affidavit having no reason to suppose or believe that they had removed, but excusing herself for denying present knowledge of their residence by reason of that personal knowledge which is the result of an actual and recent visit to their domicile. But conceding that the affidavit was honestly made, and the plaintiff had no knowledge or belief as to the place of residence of the absentees, the statute was not complied with, for the want of evidence that their residence could not be ascertained "with reasonable diligence." It is palpable that slight diligence only would have been necessary to ascertain where they resided. But the statutory proceedings for acquiring jurisdiction of absent defendants must be strictly complied with to give the court jurisdiction. The jurisdiction is strictly statutory, and can only be acquired in the mode prescribed by the statute. (*Hallett v. Richters*, 13 *How.* 43. *Brisbane v. Peabody*, 3 *id.* 109. *Kendall v. Washburn*, 14 *id.* 380.) Even admission of the service of process out of the state is ineffectual to give the court juris-

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diction *in personam*. (*Litchfield v. Burwell*, 5 How. 341. And see *Evertson v. Thomas*, Id. 45.) As the infant could not convey her estate, she cannot by any consent confer jurisdiction upon the court, or rectify or affirm the order of sale. Her power of attorney to Mr. Lamson is a nullity.

The order made at special term must be affirmed, with costs.

[NEW YORK GENERAL TERM, February 4, 1861. *Clerke, Sutherland and Allen*, Justices.]

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QUINTARD vs. DE WOLF.

The plaintiff was employed by G. to build, for one S. a machine for crushing ore; S. having previously arranged with D. & Co. to pay for the same, and the plaintiff looking to D. & Co. for payment, and commencing work upon the machine. Subsequently D. & Co. refused to pay for the machine, and the plaintiff, on being informed of such refusal, declined proceeding under his contract; whereupon the defendant promised, verbally, that if the plaintiff would go on and complete the machinery, he, the defendant, would pay for it; *Held* that this was not an agreement to pay the debt of another, nor within the statute of frauds.

Held also, that the first contract was rescinded and terminated, for all purposes, upon the plaintiff's declining to proceed further with the same; and consequently the agreement of the defendant was not collateral, but an independent and original agreement, and as such was valid and binding.

Mallory v. Gillett (21 N. Y. Rep. 412) commented upon, and distinguished from the present case.

THE complaint in this action alleged that the defendant contracted with the plaintiff for the construction by the plaintiff of a gold crushing machine, and that the defendant agreed with the plaintiff to pay to the plaintiff therefor the sum of \$2500. And also that the defendant contracted with the plaintiff for the making by the plaintiff for the defendant of a fly-wheel, to be attached to said machine, for the sum of \$125. The defendant, by his answer, denied these allegations. From the testimony it appears that in the spring

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of 1855, one Samuel Gardiner, jun., who claimed to be an inventor of a machine for crushing gold quartz, agreed to furnish one of said machines to one John Steadman, for the price or sum of \$2500, which sum Steadman was to pay therefor by his own drafts, accepted by De Wolf, Starr & Co., a firm in New York, not connected in business with the defendant. That Gardiner thereupon, in said spring, applied to the plaintiff to build said machine, and told him that he (Gardiner) wanted a crusher built, and that he would give him the acceptance of De Wolf, Starr & Co. to the paper of the party who was to have the crusher, and that he named Steadman as that party. That the plaintiff thereupon commenced the building of said machine in the spring of 1855, and proceeded with the work in said spring and the following summer and fall, until in October of that year, when it was nearly complete. About October, 1855, De Wolf, Starr & Co. refused to accept the drafts of Steadman for such machine, and Steadman thereupon applied to the defendant to accept his drafts for said machine when it should be completed, in place of the acceptance of De Wolf, Starr & Co.; which the defendant, some time in November, 1855, promised (verbally) to do. It was at this stage of the transaction that the defendant first had any thing to do with it. And he says that he merely promised (verbally) to accept Steadman's drafts for the price. The plaintiff, however, says that he went to the defendant and said to him that Gardiner told him (the plaintiff) that he (the defendant) would be responsible for this machine, and that the defendant told him to go on and make the crusher, and he would pay the plaintiff in his (the defendant's) notes, at four and six months from its completion, or would give him Mr. Steadman's draft on him (the defendant) accepted by him. Steadman refused to take the machine, or to give his drafts therefor; and the plaintiff thereupon brought this suit against the defendant, endeavoring to hold him as an original promiser, alleging that he, the plaintiff, made the machine for him, the defendant, and

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at his request. At the trial the complaint was dismissed, on the ground that the promise of the defendant, as proved, was a collateral agreement to pay the debt of another, and that it not being in writing, it was void by the statute of frauds. Upon a motion made by the plaintiff for a new trial, the following opinion was delivered, at a general term of the court held in the county of Kings in February, 1860; present Justices Lott, Emott and Brown:

By the Court, EMOTT, J. “At the trial of this cause at the circuit, the complaint was dismissed after all the evidence was in, upon the ground that the contract proved was a collateral agreement by the defendant to pay the debt of a third person, and therefore void because not in writing. To sustain this ruling it must of course appear that there was no evidence upon which the jury could have found that the defendant made a distinct and original agreement to pay the plaintiff for the labor and materials for which this suit is brought, without reference to any other person.

The plaintiff was employed by one Gardiner, in the spring of 1855, to build a machine for crushing ore. Gardiner was the inventor of the machinery, but seems not to have been a person of any pecuniary responsibility, and accordingly he was not looked to for payment, by the plaintiff, at any time. The machinery was not for Gardiner, and this the plaintiff may have known. It is probable that he did, although he asserts that he was not informed for whom it was intended, until after the defendant became connected with the affair. This person was one Steadman, who resided in Nova Scotia. He had arranged with a firm of merchants doing business in New York as De Wolf, Starr & Co. to pay for the machine. When the plaintiff was originally employed by Gardiner to make this machinery, he was told he was to be paid by De Wolf, Starr & Co.; and he no doubt relied upon this representation, although he had no direct communication with those gentlemen. In the course of a few months, however,

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some differences occurred between Steadman and this firm, and they declined to pay for the crusher as they had previously agreed to do. When this fact was communicated to the plaintiff by Gardiner, he says that he refused to go on with the work or complete the articles. This statement is not at all improbable, and is corroborated by other facts and the subsequent transactions. It is manifest that Gardiner was not considered sufficiently responsible, and as Steadman was a non-resident, of whose means the plaintiff must necessarily have been ignorant, it is altogether probable that when De Wolf, Starr & Co., upon whom the plaintiff had relied for payment, refused to be responsible, he threw up his contract and refused to complete the work. Gardiner being then anxious to have the machinery made and shipped, applied to the plaintiff again, and the plaintiff says he told him that if he would give a responsible party in New York he would go on and build the machinery. Mr. Gardiner then offered Mr. De Wolf, the defendant, who had no connection with the firm of which I have spoken, but of which another person of the same name was a member. The plaintiff having made some inquiries went to see the defendant, and the defendant told him to go on and make the machinery and he would pay him in his notes of four and six months, or in Steadman's drafts accepted by him, as he, the plaintiff, might prefer. This is the promise upon which the suit is brought, and if such a promise was really given, under the circumstances which I have mentioned, I think it was not within the statute of frauds. It is true there are some discrepancies and apparent contradictions in the plaintiff's testimony, but the effect of these upon his credibility would properly be for a jury to determine. We cannot pronounce in advance that his testimony was altogether unworthy of credit, or that all the evidence given in support of the plaintiff's claim was either incredible or plainly unreliable.

Assuming then these facts, we have substantially this case. The plaintiff having undertaken and commenced the work

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under promise of payment by De Wolf, Starr & Co., subsequently ascertains that they will not comply, and refuses to proceed with his contract. The defendant then promises if the plaintiff will go on and complete the machinery he will pay for it

I think this is not an agreement to pay the debt of another, nor within the statute of frauds. We have held in the case of *Burdon v. De Wolf*, decided at this term, that an agreement very similar if not precisely analogous to that made by De Wolf, Starr & Co. at the outset, was not within the statute. We held that a person promising to pay for machinery as they did was liable and no one else. But if no one but De Wolf, Starr & Co. was liable when they promised or were said to have promised to pay for the machinery, certainly no one else became liable afterwards. So that if the defendant promised to pay the debt of any other person it was that of De Wolf, Starr & Co. But the plaintiff abandoned his contract with them as soon as they notified their intention not to perform on their part. The contract between them was terminated by mutual consent. Under these circumstances, what passed between the plaintiff and the defendant was an entirely new agreement, with which no one else has any thing to do, and which was the only agreement in existence in relation to the machinery.

The case of *King v. Despard*, (5 *Wend.* 277,) closely resembles that before us. There the person for whom the work for which the suit was brought was originally to be performed, absconded, and thereupon the plaintiff refused to go on with the work. The defendant then represented that he had purchased the interest of the original contractor, and that if the plaintiffs would complete the work he would pay them for it. The court held that this was a new and independent agreement and not affected by the statute of frauds. The fact that the person who made the first contract had absconded was not the material point. The controlling feature in that case, as in this, was that the plaintiff had abandoned

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and put an end to the first contract, so that whatever passed between them and the defendant was quite independent of it. So in *Gardiner v. Hopkins*, (5 *Wend.* 23,) after a printer had nearly completed the printing of a book for a bookseller, the latter failed and assigned the work to a third person, who promised the printer that his bill should be paid if he would complete and deliver the residue of the work. The court held the promise binding and not within the statute. On the other hand, in *Larson v. Wyman*, (14 *Wend.* 246,) the promise was made while the work was progressing. The labor was not commenced, nor resumed after it had been abandoned on the faith of this promise. The original promisor continued to be the principal debtor, and the defendant in that case was merely his surety. In *Mallory v. Gillett*, (23 *Barb.* 610,) the work had been entirely completed, and the person for whom it was done refusing or neglecting to pay for it, the defendant promised to pay the bill if the plaintiff would deliver the boat to the original contractor. This was clearly a promise to pay the debt of the person for whom the work was done and to whom it was delivered. The original contract with the latter was never rescinded, but on the contrary was recognized and fulfilled.

The case of *Payne v. Baldwin*, (14 *Barb.* 570,) seems to have been decided on its special circumstances, under which the court held that the intention of the parties was to hold the original contractor responsible and continue the contract. The new promise was therefore held to be collateral and within the statute. The case of *King v. Despard* was cited by Judge Edmonds, in giving the opinion, but I think due importance was scarcely given to what I consider a controlling feature of that case.

In the present case, if the fact was not undisputed that the plaintiff abandoned his original agreement and refused to complete the machinery when he was informed that De Wolf, Starr & Co. refused to carry out what he had been informed was their agreement as to payment, there was at least evi-

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dence from which a jury might readily come to that conclusion. If that were so, then the negotiation between the plaintiff and defendant was a new and independent agreement; and if the promise alleged by the plaintiff had been made out to the satisfaction of a jury, he would have been entitled to a verdict.

I think these questions should have been submitted to the jury, and that therefore the verdict should be set aside and a new trial ordered; the costs to abide the event."

A new trial was accordingly had, at the circuit in Kings county, in October, 1860, before Justice BROWN and a jury. At the close of the testimony the court charged in accordance with the above opinion. Various exceptions to the charge were made by the defendant, and certain requests to charge differently were made by him, which were refused, and the defendant excepted. The jury found a verdict in favor of the plaintiff for \$3254.40. From the judgment entered on that verdict, and from an order made at a special term, on the 12th of October, 1860, denying his motion for a new trial, the defendant appealed to the general term.

E. S. Young, for the appellant.

Joseph M. Pray, for the respondent.

By the Court, EMOTT, J. When this case was before us on a previous occasion, we held that if the plaintiff abandoned and put an end to his original agreement made with Gardiner or De Wolf, Starr & Co. to construct the machinery for the price of which this suit was brought, and was then employed by the defendant to proceed and finish—the promise of the defendant made under such circumstances was not within the statute of frauds. At the second trial the jury were instructed in conformity with the rule thus indicated. The only material exceptions in the case were taken to these

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instructions, and thus the only question now really before us is, whether our former decision was correct.

We should not have listened to an argument upon such a question, had it not been stated that the court of appeals in a recent case had overruled the doctrine which we recognized, and upon which the cause was tried. We were referred on the argument to the case of *Mallory v. Gillett*, (21 N. Y. R. 412.) In that case the court of appeals affirmed the judgment which had been given in this court and which is reported in 23 Barb. 610. The latter decision in the supreme court was cited by me in delivering the opinion in this case, and was not supposed to be, nor do I now see that it is, at all in conflict with the opinion. The point which the decision covers is contained in the first paragraph of the leading opinion in the court of appeals. "One Haines," says Judge Comstock, "owed the plaintiff a debt for repairs on a boat, for which the latter had a lien on the chattel. In consideration of the relinquishment of that lien, and forbearance to sue the original debtor, the defendant promised the plaintiff, without writing, to pay the debt at a future time. There is no pretense that the defendant's promise was given or accepted as a substitute for the original demand, or that such demand was in any manner extinguished. The promise was, therefore, to answer for the existing and continuing debt of another; or in the language of the books, it was a collateral promise. The consideration was perfect, but as there was no writing the case seems to fall within the very terms of the statute."

In the present case the judge charged the jury that if the plaintiff constructed the machinery for some other person than the defendant, or if, by an understanding among the parties, he was to become responsible for machinery which was building for Gardiner or Steadman, he was not responsible. He also charged that if after De Wolf, Starr & Co. had refused to pay for the work by giving their acceptances, and the plaintiff refused to go on with the work, the defendant

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promised to pay for it, if he would complete it, the defendant was liable for the price. It will be observed that Steadman, who was to receive the machine, did not appear personally in the transaction at all. It might have been a question whether Gardiner or De Wolf, Starr & Co. were the persons originally and directly responsible for the machinery. It is not very material, however, if the original contractor, whoever he was, was discharged, and the contract terminated. The defendant's counsel asked the judge to instruct the jury that this was not the case, but that Gardiner continued from first to last liable to Quintard for the machinery. This was correctly refused, for it was asking a positive instruction as to what was, in the most favorable view for the defendant, a disputed question of fact. If the judge had been asked to say to the jury that if Gardiner was and continued all the time from first to last liable to Quintard for the machine, then the defendant was not liable, no doubt he would have so stated, for that is the import of his whole charge. The material fact insisted upon in the opinion already delivered, and with reference to which the case was tried the second time, was that the first contract was rescinded and terminated for all purposes, and therefore the agreement upon which the action was brought was not collateral but independent and original.

I have read with great interest the learned and ingenious review and classification of the cases upon this part of the statute of frauds, which forms the conclusion of Judge Comstock's opinion in *Mallory v. Gillett*, but I have not found in his reasoning any thing inconsistent with the views already deliberately expressed by this court. It would be sufficient, for us to stand by what we have decided, that the judgment in *Mallory v. Gillett* is not in conflict with it; but it is satisfactory to find that the most acute and exhausting discussion of the subject discloses nothing inconsistent with our views.

The judgment must be affirmed, with costs.

[DUTCHESS GENERAL TERM, May 13, 1861. *Emott, Brown and Scrugham*, Justices.]

HARRIET S. ONDERDONK, and HARRIET C. ONDERDONK an infant, by W. H. Onderdonk, her guardian *ad litem*, vs. WILLIAM J. MOTT and others.

The supreme court possesses all the powers and exercises the functions both of the supreme court and the former court of chancery; but it has not acquired, by the blending of the two tribunals, any right or authority which did not belong to one or the other of their formerly separate jurisdictions.

Notwithstanding the attempt to combine law and equity, the action and administration of the court is perfectly distinct in affording legal or equitable remedies; as much so as when the remedies were to be sought in different courts.

Where there is no trust, and there is no personal estate in the distribution of which any trust can arise, devisees who claim merely legal estates in the real property of the testator are not authorized to bring a suit in equity to obtain a judicial construction of the will of the testator.

Where the question to be determined is a purely legal question, concerning the nature of the estates created by a will in the lands devised, *it seems* the proper remedy is in a court of *law*, by an action of *ejectment* to be brought by a party claiming the lands, or some portion of them, under one construction of the devise, against another party withholding the possession under another construction.

The whole power of the court to order the sale of the lands of infants is derived from the statute. There is no such original jurisdiction in a court of equity.

If such statutory jurisdiction can be exercised upon bill or complaint, as well as in the ordinary mode by petition, still there is no authority for uniting in such a suit parties who claim a legal title adverse to the infant, and compelling them to litigate that claim and have it passed upon; and there are insuperable objections to such a course.

To authorize a proceeding under the statute for the determination of claims to real estate (2 R. S. 312) the claim of the defendant must be adverse to the party in possession.

Proceedings cannot be instituted by one having a life estate in premises, under a will, against the devisees in remainder.

Nor can they be instituted by one who is not in possession.

THE complaint in this action alleged that the plaintiff, Harriet C. Onderdonk, was an infant under the age of 21 years, and that William H. Onderdonk had been duly appointed her guardian for the purposes of this action. That Robert W. Mott, late of Queens county, now deceased, on the 6th day of August, in the year 1844, duly made and executed

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his last will and testament, which was set out in the complaint at length. By this will the testator, after giving several legacies and bequests to his relatives, devised as follows: "All the rest, residue and remainder of my property, with the exceptions and reservations hereafter named, I leave to my daughter, Harriet S. Onderdonk, during her life, and after her decease to her children and their heirs in equal proportion forever." The testator then excepted and reserved a part of the farm, and two stores, which he directed to be sold for the payment of his debts. And he ordered that in the event of the death of his said daughter Harriet, without any child or children, the said residuary estate, real and personal, should be divided among Sarah L. Cogswell and others, the defendants in this action, in the manner and in the proportions particularly specified, charged with the payment of a large amount of legacies.

The complaint further alleged that at the time the said will was executed the said Robert W. Mott was a widower and had one child only, the above named plaintiff, Harriet S. Onderdonk, the wife of William H. Onderdonk, and who is the same person described in the will by that name. That the said Harriet S. Onderdonk had at that time one child only, the above named plaintiff, Harriet C. Onderdonk, who was born on the 9th day of July in the said year 1844, and was at the date of the execution of the said will less than one month old. That all the real property owned by the said testator at the time of the execution of his said will, consisted of the farm and stores described in the will, and also of the house and lot mentioned therein and devised to Charlotte B. and Alice F. Cogswell for life, and which was of the value of not over \$1000, which said several parcels of land was all the real estate of which the testator died seised. That the above named testator died on the 19th day of November, in the year 1846, leaving his said daughter, Harriet S. Onderdonk, and his grand-daughter, the above named plaintiff, Harriet C. Onderdonk, and a grandson,

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Robert Mott Onderdonk, son of the said Harriet S. Onderdonk, who was born on the 26th day of February, 1846, his only descendants him surviving. That the said Robert Mott Onderdonk departed this life on the 23d day of March, in the year 1857. And that the said Harriet S. Onderdonk has had no other children. That the said will was duly proven before the surrogate of the county of Queens, who had jurisdiction of the probate thereof, on the 5th day of December, in the year 1846, and admitted to probate and recorded as a will of personal and real estate. That the plaintiff, Harriet S. Onderdonk, has been since the decease of the said testator and is now in the actual possession as tenant for life of the lands so left and devised by him, except such as have been sold under the directions contained in the will, and except also the house and lot devised to Charlotte B. and Alice F. Cogswell as aforesaid. That the testator at the time of the making of his will and of his decease, was indebted in the amount of about \$25,000 on his personal obligations, and in the sum of \$6000 secured by a mortgage on his store No. 116 South street, New York. That since the death of the said testator, and on the 5th day of December, 1846, letters testamentary were duly issued by the surrogate of the county of Queens, to Harriet S. Onderdonk and others, the persons named in the said will as executors, who duly qualified. That the plaintiffs, Harriet S. Onderdonk and William H. Onderdonk and Oliver H. Jones are the only surviving executors. That the real property directed to be sold by the executors for the payment of debts has been sold by them pursuant to the directions in the said will contained. That the proceeds of the real property thus sold, in addition to the personal property of the testator owned by him at the time of the making of his will and of his death, were not more than sufficient to pay the debts of the testator, not secured by mortgage. That the mortgage for \$6000 on the store No. 116 South street still remains unpaid. That at the time of the execution of the will the said stores in South street and

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corner of Peck slip, were very old and out of repair, the main walls much settled and cracked, requiring constant and large expenditures to keep them tenantable, and from their condition not available for the better sorts of commercial business. The three together rented for the sum of \$2100. The testator, on account of the condition of the buildings, was endeavoring to effect a sale of the property. That the said property requires extensive improvements which can only be effected at great cost; that the buildings on the said lots are in a very dilapidated condition, so that the upper parts of them are not occupied and have not been for some time past. That the store No. 116 South street, has been advertised by the chief engineer of the fire department as unsafe. That by reason of their age, having been erected from fifty to sixty years, and the cracking and settling of the main walls and the condition of the roofs which are of tiles, they cannot be thoroughly repaired without the expenditure of a very large sum of money, and not then so as to be permanently improved. And that the only way in which the said property can be made properly available is by the erection of new stores upon it in the place of those now standing there, by which means the net income can be very largely increased. And the plaintiffs further showed that they were prevented from making these improvements upon the property and from enjoying the benefit that might be derived therefrom and were unable to raise the money necessary for such improvements by a mortgage or lease of the said property, for the reason that the above named defendants, William J. Mott, John J. Mott and Mary Esther Jones, the wife of the defendant Samuel A. Jones, who at the time of the execution of the said will, were and now are the only children of James W. Mott, the brother of the testator mentioned in the said will, claim some right, title and interest in fee in remainder in the said premises as devisees under the said will, which claim is adverse to the rights of the plaintiffs. And that they and the defendants, William Mott and Mary F. Jones, the wife

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of William P. Jones, who at the time of the execution of the said will were and are now the only children of William W. Mott, the brother of the testator mentioned in the said will, claim some right, title and interest in fee in remainder in the said premises situated at Great Neck, as devisees under the said will, which claim is adverse to the rights of the said plaintiffs. That the said William W. Mott and James W. Mott, the brothers of the testator, are both deceased, and that since the execution of the will they have had no children except those above named, and who are all made defendants in this action. And the plaintiffs claimed the lands described, under the will of the said Robert W. Mott, as follows: the said Harriet S. Onderdonk as tenant for life, and the said Harriet C. Onderdonk as the absolute owner of the fee, one-half thereof as devisee under the will of the said Robert W. Mott, and the other half thereof as heir of her brother, Robert M. Onderdonk, one of the devisees under the said will, and that the estate of the said Harriet C. Onderdonk is subject to open and let in any child or children (if any) who may hereafter be born of her mother, the said Harriet S. Onderdonk. Wherefore the plaintiffs prayed the court to construe the said will of Robert W. Mott, and to determine the claims of the parties to this action to the real estate and to declare and determine the rights and interests of the said parties in the real estate under the said will. And they demanded judgment that the defendants and all persons claiming under them or either of them subsequently to the commencement of this action, be forever barred from all claim to any estate of inheritance or freehold of every kind whatever in the said premises hereinbefore described, and that authority be given to sell the said premises, or to mortgage or lease the same, for the purpose of improving the said property or for such other or further relief in the premises as should be found meet.

The defendants put in an answer denying and controverting the principal allegations in the complaint, and praying that the complaint be dismissed.

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The cause was tried before Justice LOTT, at a special term, without a jury. The following opinion was delivered by him, on deciding the case :

LOTT, J. "The primary object of the complaint in this action is to obtain a judicial construction of the will of Robert W. Mott in reference to certain devises of his real estate.

The question raised is purely legal. No trusts or any matters of an equitable nature are involved. It is conceded that Mrs. Onderdonk has a life estate in the property, and the question sought to be determined is whether the defendants, in the event of her death without leaving any children her surviving, will have any right or interest in that real estate.

A judicial decision of that question cannot in my opinion be had, till the event arises. It was said by Chancellor Walworth, in *Bowers v. Smith*, (10 *Paige*, 193,) that he was 'not aware of any case in which an heir at law of a testator or devisee who claims a mere legal estate in real property, when there was no trust, has been allowed to come into a court of equity for the mere purpose of obtaining a judicial construction of the provisions of the will.'

I have been referred to no case where it has been done, and I know of no principle on which such an adjudication should be made. In this case there is a reason why it should not be, even if it were competent to do so. The plaintiffs concede that the estate now claimed to be vested in Harriet C. Onderdonk (one of those plaintiffs) 'is subject to open and let in any child or children (if any) who may hereafter be born of her mother,' (the other of said plaintiffs.)

The decision therefore would not be conclusive on the rights of the parties, if any such child should hereafter be born, and it would be unjust to the defendants to expose them to a second trial of the same question.

The complaint also asks for authority to sell, mortgage or lease the property; but as that relief was asked on the assumption that the rights of the parties would be determined

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by the court, it would not be proper now to pass either on the power of the court to grant it, or the propriety of exercising the power, if it existed.

Under these circumstances, the complaint must be dismissed with costs, but without prejudice to the rights of any parties in any future litigation."

From the judgment entered at the special term, the plaintiffs appealed to the general term.

Wm. H. Onderdonk, for the appellants.

C. A. Hand, for the respondents.

By the Court, EMOTT, J. We cannot avoid encountering at the threshold of this case, the difficulty which in the opinion of the judge who tried the cause, was fatal to the plaintiff's action. Before we can consider or determine what estate the infant plaintiff took under the will of Robert W. Mott, in the lands described in the complaint, we are to see whether we are not to say required, but authorized to pronounce a judgment deciding or affecting that question. The defendants object to the jurisdiction of the court to entertain such an action as the present, or rather object that it would not be a proper exercise of its jurisdiction to declare the construction of this will, and even if they did not formally make such an objection, it must nevertheless be insuperable, if it exists. This court possesses all the power and exercises the functions both of the supreme court and the former court of chancery, but it has not acquired by the blending of the two tribunals any right or authority which did not belong to one or the other of their formerly separate jurisdictions. And notwithstanding all that has been said and attempted in respect to combining law and equity, the action and administration of the court is perfectly distinct in affording legal or equitable remedies, as much so as when they had to be sought in different courts.

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The question which we are asked to decide upon the will of Mr. Mott is a purely legal question; that is, it concerns the nature of the estates created by the will in the lands devised. There is no trust, and there is no personal estate in the distribution of which any trust could arise. It is or will be a question of title to the real estate, which unless otherwise previously disposed of, must ultimately come before a court of law, in an ejectment suit, to be brought by a party claiming these lands, or some portion of them, under one construction of these devises, against another withholding their possession under another construction. So far as this suit merely contemplates or calls for a judicial construction of this will, it falls beyond the limits of equity jurisdiction. We are forbidden to entertain such a suit, by a rule which is well settled and so far as I know inflexible. The rule is stated by Chancellor Walworth, in *Bowers v. Smith*, (10 *Paige*, 193,) and his statement meets our full approval. The counsel for the plaintiffs, who argued this appeal with a degree of learning and ability proportioned to his naturally profound interest in the question, has called our attention to the case of *Ash v. Coleman*, decided in this district, upon a case submitted under the code, reported in 24 *Barb.* 645. That case, however, does not militate against our views, for it will be found upon examination that it was an ejectment, in which the judgment was for the recovery of the land. We rendered the same judgment upon the submission of the case by the parties, as we should if one had brought an action against the other; and it must have been a judgment for the plaintiff, although its form does not appear by the report.

It is contended, however, that we must take jurisdiction of the action, as brought for a sale of the estate of the infant plaintiff, and as auxiliary to this relief, must declare what that estate is. The whole power of the court to order the sale of the lands of infants is derived from the statute. (2 *R. S.* 194, 195.) There is no such original jurisdiction in a court

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of equity. (*Rogers v. Dill*, 6 *Hill*, 415. *Baker v. Lorillard*, 4 *Comst.* 266.) If this statutory jurisdiction can be exercised upon bill or complaint, as well as in the ordinary mode by petition, still there is no authority for uniting in such a suit parties who claim a legal title adverse to the infants, compelling them to litigate that claim, and pronouncing upon it, and there are insuperable objections to such a course. These parties have no interest in the question whether the infants' interest ought to be mortgaged, leased or sold; nor have the two questions any proper relation to one another. The existence of adverse claims might be a reason why the court would not think it for the interest of the infant to sell, or it might possibly lead to an opposite conclusion, and the court might in behalf of the infant, examine his title with a view to the protection of his interests as its ward. But that is a different matter from calling in his adversaries, compelling a discussion of their rights and pronouncing a judgment upon them. I do not perceive that we should be any more authorized to decide such a legal question, because our authority to authorize a disposition of the interest of one of the parties to it is invoked, than we should be without that element in the case. If a sale of an infant's estate is ordered, its completion by the purchaser does not depend upon the character, the quantity or quality of the infant's estate, where that turns upon a contingency, or upon the construction of a devise, and is not a present interest. If a sale was ordered of a supposed present interest of an infant, which turned out wholly to fail in consequence of another paramount title, so that the lands belonged to another, it might be that a purchaser would not be required to pay for what the infant could not sell. But in such a case as this, the conveyance would pass her estate under the will, whatever it was, and if the court should order such a sale, I confess I do not see how a purchaser could be relieved from his purchase, if he became satisfied that she had merely a contingent remainder and not an absolute or a

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present fee. It is evident, it may be added, that the real object of this suit is to get a construction of this will, and that the sale or mortgage of the infant's interest is a subordinate and far less material matter.

There is another ground upon which we were urged to entertain the question in its purely legal aspect, as a proceeding under the statute for the determination of claims to real estate. (2 *R. S.* 312.) Such a case as this cannot, however, be brought within any fair construction of that statute. It is true that proceedings may be taken to compel the determination of a claim in reversion or remainder, as well as to the possession of lands. But in every case the claim must be adverse to the party in possession. A. B. in possession of lands for a particular time cannot compel the determination of a claim by C. D. against E. F., who is supposed to be the party rightfully entitled after A. B.'s estate determines; nor can C. D., so long as A. B.'s estate lasts. But that is precisely what is attempted here. Mrs. Onderdonk is conceded on all hands to have a life estate in the premises. The claim of the defendants is not against her, nor so long as her estate lasts, but to the fee at her death, in a certain contingency, and against the heirs of her child or children. She cannot compel the determination of that claim, because it is not against her, and will not in any event interfere with her present estate. Her daughter, the plaintiff, who is a minor, cannot institute a proceeding during her mother's life to compel the determination of such a claim, because she is not in possession. The statute gives the remedy only to persons in possession, and such is the plain reason of the thing. It is a substitute for an ejectment, although extended to a future as well as an immediate right to possession, if it be a right against the person holding the land.

I have not been able to surmount the difficulty which defeated the plaintiffs at the trial, nor to see how this court could consistently with the uniform course of authority and

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the well settled rules of law and limits of jurisdiction entertain the present action.

It is therefore my opinion that this judgment must be affirmed.

[DUTCHESS GENERAL TERM, May 13, 1861. *Emott, Brown and Scrugham*, Justices.]

SHELDON vs. STRYKER, Sheriff, &c.

A judgment entered by confession, although it be not confessed in conformity with the provisions of the code, (sec. 382,) is not absolutely and utterly null and void, but voidable at the instance of certain creditors.

So long as it remains unvacated, and apparently in full force upon the records of the court, it cannot be impeached collaterally; and the record thereof should not be rejected when offered in evidence by a sheriff as a justification for taking property.

A subsequent purchaser under the judgment debtor, in order to avail himself of defects in the judgment, must proceed by suit or motion directly against the judgment.

THIS action came before the court by virtue of an order made by Justice LOTT, at the trial, directing the defendant's exceptions to be heard at the general term, in the first instance, with a stay of the plaintiff's proceedings in the meantime. The issues were tried April 9, 1860, and the jury, under the charge of the court, rendered a verdict for the plaintiff for \$1000, as the value of the property taken, and \$192.50 as damages, being interest upon the value from the time of the taking. The complaint sought to charge the defendant, as sheriff, for taking a stock of millinery and straw goods from the store No. 166 Grand street, in the city of Brooklyn, of the alleged value of \$2000, besides claiming \$1500 for injury to business, &c. The plaintiff claimed that on or about the 29th of July, 1857, he was the owner of the stock, and that on that day the sheriff seized the same. The

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answer, after joining issue upon the principal allegations of the complaint, set forth that the defendant, upon the *ninth* day of July, 1857, took certain property from the premises in question, under an execution issued to him upon a judgment in favor of "Ide, Felt & Hall," of the city of New York, entered up in the supreme court for the first judicial district, in the office of the clerk of the city and county of New York, for \$2968, on or about July 6th, 1857, against William S. Irvine and Alexander Irvine, to whom the answer averred the property so taken belonged. The execution was alleged to have been issued July 9th, 1857, and levied the same day, and the jury found that the levy was made on the 10th July. On the trial the defendant's counsel moved to dismiss the complaint, on various grounds. The court denied the motion, and held that the defendant must prove a valid judgment and execution, as claimed in his answer, before he could attack the plaintiff's title. To this decision the defendant's counsel excepted. The defendant's counsel then offered in evidence an exemplified copy of a judgment roll, in favor of Edwin Ide and others, against William S. and Alexander Irvine, which is in the following words, viz:

"City and county of New York, ss: We, William S. Irvine and Alexander Irvine, of the city of New York, defendants above named, do hereby confess judgment in this action in favor of Edwin Ide, William N. Felt and Mortimer G. Hall, plaintiffs above named, which judgment may be entered against us for the sum of \$2963.

We further state that we are justly indebted to said plaintiffs in said last mentioned sum, and that the following are the facts out of which our said indebtedness arose: That said plaintiffs, at different dates between the month of March in the year 1855, and the month of August in the year 1856, sold and delivered to us, at the city of New York, divers goods, chattels and merchandise, which goods, chattels and merchandise were, in the aggregate, worth \$2937.52, and this was the price agreed by us to be paid to said plaintiffs there-

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for. That we have not yet paid the same, or any part thereof, but remain indebted therefor to said plaintiffs in said last mentioned sum, together with \$25.48 for interest due thereon. We, therefore, authorize the entry of judgment against us in this action, in favor of said plaintiffs, for the sum of \$29.63.

Witness our hands at the city of New York, this 5th day of January, 1857.

City and county of New York, ss: William S. Irvine and Alexander Irvine, defendants above named, being severally duly sworn, depose and say that the facts contained in the above statement are true.

WILLIAM S. IRVINE.

ALEXANDER IRVINE.

Sworn before me this 5th day of January, 1857.

JOHN HOOPE, Com'r of Deeds.

(Indorsed.) Supreme court. Edwin Ide and others against William S. Irvine and Alexander Irvine. Judgment roll. Geo. F. Chester, plaintiffs' attorney. Judgment, July, 1857.

On filing within statement, it is adjudged that the plaintiffs recover of the defendants \$2963 together with \$5 costs, amounting in all to \$2968. July 6, 1857.

R. B. CONNOLLY, Clerk.

Filed July 6, 1857, at 9 o'clk 30 min."

To this was annexed the usual certificate of the county clerk.

The plaintiff's counsel objected to the admission of this judgment roll in evidence, on the ground, 1st. That the statement therein contained, and on which said alleged judgment was entered by confession, was clearly insufficient, and not in compliance with section 383 of the code of procedure, inasmuch as it did not state concisely the facts out of which it arose, neither was it signed or verified by them, as required by said section. 2d. That the *condition precedent* not having been performed, and the judgment not having been entered in the manner prescribed by the code, the court had no jurisdiction, and the judgment was absolutely void. 3d. That the defendant must justify, if at all, under a valid and subsisting

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judgment, and that evidence of a judgment void upon its face would be irrelevant and inadmissible. Objections sustained, and the exemplification of the judgment roll and proof of the judgment were excluded by the court, to which ruling the defendant's counsel excepted. *Andrew Mercein*, a witness sworn on behalf of the defendant, testified that he was a deputy of the county clerk of Kings county, and as such, had custody of the books and papers of said office. Witness produced from the files of said office a transcript, in due form of the judgment, of which a copy of the roll is above given, made by the clerk of the city and county of New York, and testified that said transcript was filed in the Kings county clerk's office, July 8, 1857, at 3.15 P. M. Witness also produced and verified the docket of judgments made in the office of the clerk of the county of Kings, by which it appears that said transcript was duly docketed in said last mentioned office, on said 8th July, 1857, at 3.15 P. M. The defendant's counsel offered to read said transcript and docket in evidence. He also offered in evidence an execution against the property of the Messrs. Irvine, in due form, proven to have been duly issued to the defendant, as sheriff of the county of Kings, July 9th, 1857, upon the judgment above recited. The admission of the said transcript, docket and execution in evidence was, in each instance, objected to by plaintiff's counsel, on the ground that the judgment upon which they were based, was entered upon an insufficient statement, as aforesaid. The objection was sustained by the court, and the said transcript, docket and execution were severally excluded by the court; and to the decision of the court in that behalf, and each and every part of it, the defendant's counsel excepted.

F. C. Bliss, for the plaintiff.

John Graham, for the defendant.

By the Court, EMOTT, J. The defendant attempted to justify, at the trial, under an execution issued upon a judg-

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ment entered by confession, against William S. and Alexander Irvine, who were originally the owners of the goods of which the plaintiff claimed to be a purchaser. The judge excluded the judgment record and the execution, on the ground that the judgment was not confessed in conformity with the provisions of the statute, (*Code*, § 383,) and was therefore utterly void and no protection to the officer. The question is whether, assuming that the statement in the judgment or the verification, or both, were not sufficient under the code, the proceeding is simply void in the strict sense of the word, so that it affords no justification to an officer even while remaining unvacated and apparently in full force upon the records of the court.

If such be the rule, it will be a harsh and oppressive one for sheriffs and other ministerial officers, since it will cast upon them the necessity of determining, when process is placed in their hands, the validity and sufficiency of the judgment upon which it issues, and whether a formal entry and record of an adjudication of the court does or does not contain what is necessary to comply with the provisions of the statute. These are questions upon which, in the various and numerous cases that have arisen and are occurring, the judges have widely differed, and it is not probable that sheriffs would come to more uniform or more certain conclusions.

Still if the effect of a want of conformity to the requisitions of the statute in the sufficiency or particularity of the statement, or the form of the affidavit, in a judgment by confession, be to render it altogether a nullity, then the rule and its consequences must be as just indicated, and the proceeding or paper offered in evidence by the defendant in this case was properly excluded, as not being a judgment at all. It is true that in some of the cases, as in *Von Beck v. Shuman*, (13 *How. Pr. Rep.* 472,) and *Winnebrenner v. Edgerton*, (30 *Barb.* 185,) some of the judges have used very strong language, condemning insufficient judgments as "void," and refusing to permit their amendment to the prejudice of any

intervening rights or equities. But it will be observed that these were applications to vacate the judgments; the question was whether the defects indicated were mere irregularities, or went to the substance of the judgment, and particularly whether they could be amended, so as to cut off subsequent liens, by an order *nunc pro tunc*. The courts have undoubtedly come to the conclusion, though after some hesitation, that an amendment of such an insufficient judgment can only be made to take effect at the date when it is ordered, and as between the parties to the record.

Even this exercise of the power of amendment, however, is fatal to the doctrine asserted here; for how can that which is absolutely null and void to all purposes, be amended.

The court of appeals, in *Chappel v. Chappel*, (2 Kernan, 215,) held that the language of the code of procedure in reference to these judgments must be construed as equivalent in effect to the provisions of the act of 1818. That act (*Laws of 1818, ch. 259, § 8*) declared that judgments by confession not conforming to its provisions should be taken to be fraudulent as against creditors. In *Dunham v. Waterman*, (17 N. Y. Rep. 9,) the same view is taken and explained. The court say, in that case, that a judgment confessed without a compliance with the provisions of the code is fraudulent and void as against creditors. Similar language to this is to be found in the statutes of fraudulent conveyances, 13 and 27 Eliz and in our statutes of frauds; and the meaning and effect of a declaration that instruments which offend against their provisions shall be void, or utterly void, has been repeatedly considered.

It has always been held, under the strongest language employed in these statutes, that such deeds or other instruments and proceedings are not absolute nullities, but voidable only, liable to be declared void, at the instance of parties whom they affect injuriously. In *Anderson v. Roberts*, in the court of errors of this state, reported in 18 John. 515, 524, will be found an admirable discussion of this point by Ch. J. Spencer.

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Whenever the act done takes effect as to some purposes, and is void as to persons who have an interest in impeaching it, the act is not a nullity, and therefore is voidable in strict legal sense, and not utterly void. Whenever the act or deed is valid as to some persons, although it may be avoided at the election of others, it is not utterly void. (*See Bac. Abr. tit. Void and Voidable.*) There is a case in 2 *Salk.* 674, (*Prigg v. Adams,*) which is very applicable to the present. It was an action of false imprisonment. The defendant justified under a *ca. sa.* upon a judgment in the common pleas for 5s. on a cause of action arising in Bristol. The plaintiff replied an act of parliament forbidding any court in Westminster to give judgment in a cause of action arising in Bristol for less than 40s., and that any such judgment should be void. But it was held that the judgment was not void, so that the party could take advantage of it in that collateral action.

The judgment record should not have been excluded at the trial of this cause, unless it is an absolute nullity. But it is not an absolute nullity if it is valid as to any persons. It is valid as to the defendant in the judgment, for he cannot even move to set it aside; and such judgments are always amended as to him. It is not therefore absolutely and utterly null and void, but voidable at the instance of certain creditors; and it follows that it could not be impeached collaterally, and should not have been rejected when offered in evidence. The plaintiff must proceed by suit or motion directly against the judgment, in order to avail himself of its defects.

In this view of the case it is unnecessary to consider whether such defects exist, or any other question in the case. The verdict must be set aside and a new trial ordered; the costs to abide the event.

[DUTCHESS GENERAL TERM, May 13, 1861. *Emott, Brown and Scrugham* Justices.]

THE PEOPLE OF THE STATE OF NEW YORK *vs.* THE NEW
YORK CENTRAL RAIL ROAD COMPANY.

The act of the legislature, passed July-10, 1851, releasing all rail road corporations within the state from any liability to pay tolls upon freight, and repealing the existing statutes imposing such obligation upon them, was not in violation of any part of the constitution of the state of New York.

THIS action was brought for the recovery of tolls upon freight transported by the defendant, upon its rail road, since December 1, 1851. The defendant claimed to be exempted from the payment of all tolls since that day, by virtue of the provisions of an act of the legislature passed July 10, 1851, entitled "An act to abolish tolls on rail roads." By the first section of that act it was enacted that it should not be necessary for any rail road company in this state to pay any sums of money into the treasury, on account of the transportation of property on any rail road, on and after the 1st day of December, 1851. By the 2d section it was declared that it should not be necessary, after that day, for any rail road company to make any monthly statements to the comptroller of the property carried by it. And by the 3d section, all acts and parts of acts requiring the payment of state tolls by any rail road company, upon freight, were, after the said 1st day of December, 1851, so far as they conflicted with that act, repealed. (*Laws of 1851, p. 927.*)

The case came before the court on a motion for a new trial made by the plaintiff upon a case, with exceptions. The action came on for trial at the Orange county circuit court, held before Justice BROWN, in January, 1861. After hearing the evidence on both sides, a motion was made by the defendant's counsel to dismiss the complaint, or nonsuit the plaintiffs, on several grounds, which motion was granted by the court. Thereupon the learned justice ordered that the exceptions taken by the plaintiffs' counsel on the trial should be heard in the first instance at the general term. The complaint alleged in substance : *First.* The incorporation of the defend-

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ant under the act of April 2d, 1853, and that pursuant to the provisions of the said act the defendant became subject to the liabilities and provisions of the general rail road act of April 2, 1850, one of which provisions is set forth, viz: the 29th section of said act, subjecting any road formed under it, and running parallel or nearly parallel to any canal of this state, and within thirty miles of said canal, to tolls on property other than baggage transported upon it, for the same amount that would have been payable to the state, if the property had been transported on such canal. That the defendant's rail road runs parallel, or nearly so, to the Erie canal, and not more than thirty miles therefrom. *Second.* That seven rail road corporations, known as the Albany and Schenectady, the Utica and Schenectady, the Syracuse and Utica, the Auburn and Syracuse, the Auburn and Rochester, the Tonawanda, and the Attica and Buffalo rail road companies, were among the corporations consolidated into the defendant, and, previous to and in the year 1844, formed a connected and continuous line of rail road communication from or near the navigable waters of Lake Erie, to or near the navigable water of the Hudson river at Albany. *Third.* That four of said companies, viz. the Albany and Schenectady, the Tonawanda, the Auburn and Syracuse, and the Attica and Buffalo rail road companies were, by their charters, authorized and empowered to carry freight without being required to pay tolls. That the Syracuse and Utica Rail Road Company were empowered by their charter to carry freight, but were required to pay into the canal fund tolls on property transported during the period of canal navigation; that the Utica and Schenectady Rail Road Company were prohibited by their charter from carrying any freight: all which charters were liable to alteration or repeal, as will appear by the several acts which are referred to as part of the complaint. *Fourth.* That by an act passed May 7th, 1844, the Utica and Schenectady Rail Road Company were authorized to carry property during the suspension of canal navigation and to receive

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compensation therefor; and were required to make returns of such property carried, at such period and in such manner as should be directed by the commissioners of the canal fund, and to pay to the said commissioners the same tolls as canal tolls. That it was also provided by said act that five of the other companies, naming them, should make the same returns, be liable to the same tolls, and subject to the same regulations. *Fifth.* That the said companies accepted the privileges and assumed the obligations of the last named act, and carried large quantities of freight and paid tolls thereon until at and after November 3d, 1846, when the new constitution was adopted, and January 1st, 1847, when the same became in force, "*which said tolls at that time formed and were a part of the revenues of the state canals.*" *Sixth.* That by sections 1, 2 and 3, of the seventh article of said constitution, all the "revenues of the state canals" were pledged and appropriated to the payment of the interest and the redemption of the principal of the debts of this state, and for the use and benefit of the general fund, and for the completion of the Erie canal enlargement, and the Genesee Valley and Black River canals, until the said canals should be completed. That neither July 10th, 1851, when the act releasing tolls was passed, nor December 1st, 1851, when it became operative, were the said canals completed, or the debts redeemed out of the said revenues, nor are said canals now completed or the said debts paid. That by section 6, article 7, of the constitution, the legislature are prohibited from selling, leasing or otherwise disposing of any of the canals of this state, but they are to remain the property of the state, and under its management for ever. *Seventh.* That by an act of May 12th, 1847, the Utica and Schenectady Rail Road Company were authorized to transport freight, and were required to make returns as should be directed by the commissioners of the canal fund, and were required to pay into the treasury of the state the same tolls per mile as would have been paid on such property if it had been transported upon the canals. That

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by the same act, seven other companies, naming them, were subject to the same provisions, with the further provision that no freight passing from one of said roads to a connecting road, for transportation, should be deemed local freight. That said act provided that the tolls thus collected *should be deemed to belong to the canal fund, and should be paid over and applied in the same manner as tolls collected on freight transported on the canals.* *Eighth.* That the tolls provided for and collected under these acts, became and were a part of the revenues of the state canals. That those which were collected under the last act, accruing during the period of canal navigation, were derived from freight appurtenant and belonging to said canals; and said rail roads, at the time of the adoption of the said constitutional provisions, were incapable of transporting said freight for want of corporate power, nor was there, nor is there, any other mode by which the said freight could or would be transported, except the said rail road and the said canals. *Ninth.* That while the said toll and revenues formed and were a part of the said revenues of the state canals, and on the 10th of July, 1851, the legislature of the state of New York passed a pretended act, whereby it was pretended and attempted to be enacted, that all acts and parts of acts requiring the payment of state tolls by any rail road company for the transportation of property on any rail road were, after the first day of December then next, repealed. That the said act was and is unconstitutional and void, inasmuch as the same *disposed of the said canals and their freight and revenues* in a manner inconsistent with the provisions of the constitution. That notwithstanding said act the said companies were, and the defendant is, bound to pay to the canal fund the same rates of toll as if said act had not been passed. *Tenth.* That the several companies consolidated (naming seven or eight of them) after December 1, 1851, and before the consolidation, carried freight subject to tolls, to a large sum of money, and the defendant is liable therefor to the plaintiffs; and that said defendant, since the consoli-

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dation, and prior to the 1st day of July, 1860, has carried large quantities of freight subject to the payment of such tolls aforesaid, all of which said tolls are and form a part of the revenues of the state canals—which tolls amount to five millions of dollars, for which sum the plaintiffs demand judgment.

The following is the substance of the answer: *First.* It denies that the defendant is subject to the provision in section 29 of the act of April 2d, 1850, referred to in the complaint. It denies that the tolls collected under the act of 1847, occurring during the period of canal navigation, arose from freight appurtenant and belonging to the said canals. Matters of law having been averred, these matters are denied in the answer. It denies that the rail road and canals are the only modes by which the freight could or would be transported, and avers that much of it would have passed by and through routes and channels, some of which have been made and opened by the authority and aid of the plaintiffs. It denies that the Schenectady and Utica company was required by its charter to pay tolls into the canal fund. It has no knowledge or information sufficient to form a belief, as to whether the several rail road companies named in the complaint, carried large amounts and paid freights and tolls imposed by the act of 1844. It denies that any one of those companies, or the defendant, carried freight subject to the payment of canal tolls after December 1st, 1851. *Second.* It pleads the statute of limitations to all claims accruing more than six years prior to the commencement of the action. *Third.* The act of July 10th, 1851, is pleaded with an averment that three fifths of both houses were present at its passage. It is averred that the governor signed it, and that it is a valid law, and its provisions are recited. *Fourth.* It avers that all laws requiring payment of tolls by rail roads are in conflict with sections 8, 9 and 10, of article 1, of the constitution of the United States, and the power to repeal was reserved in the acts of 1844 and 1847, mentioned in the complaint. *Fifth.* The act

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of April 5th, 1850, releasing live stock and other articles from tolls, is pleaded.

It is averred that in 1853 and 1854, the plaintiffs amended the constitution, by providing a substitute for section 3, and article 7, by which substitute the plaintiffs authorized the canal board to reduce the rates of tolls with the concurrence of the legislature, and to remove them entirely, whereby the plaintiffs ratified the acts of 1850 and 1847. That since the adoption of the present constitution, the canal board, with the concurrence of the legislature, has reduced the rates of toll on property transported on the state canals, so as materially to diminish the revenues; and the plaintiffs' officers have misappropriated, diverted and squandered said revenues, and therefore the canals are unfinished, and the requirements of sections 1, 2 and 3, of article 7, have not been fulfilled. That the rates of toll have been frequently changed by the plaintiffs' authority since July 10th, 1851; that since that time the canal board has made no rules or regulations as required by sections 4 and 5 of the act of May 7th, 1844, and by section 4 of the act of May 12th, 1847; and that the commissioners of the canal fund have never, in any way, since the act of 1857, until May 4th, 1860, made any rule or regulation as required by section 4 of the act of 1847. That relying on the validity of the act of 1851, the defendant accepted its charter and contracted large obligations, for which its bonds are now out and unpaid; and has charged and received less compensation than it would have done, but for the act of 1851, and has issued scrip for its capital stock, large amounts of which have been bought and sold by its stockholders, relying on the validity of said act; that the defendant will suffer damages to a large amount if the said act is declared void. The defendant insists that the plaintiffs are, by these acts of the legislature, by the amendments to the constitution, by the omission of the canal board and the commissioners of the canal fund to adopt rules as above stated, by the reduction and alteration of the rates of toll, by

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its conduct in authorizing and aiding in the construction of other channels of trade, by which business has been diverted from the defendant's road, estopped in law and equity from denying the validity of the act of 1851, or maintaining this action.

Although the complaint claims tolls since December, 1851, the bill of particulars was confined to the period of six years prior to the commencement of the action, and this amounted to the sum of about four millions of dollars. On the trial of the cause the claim was reduced still further, by the abandonment, on the part of the attorney general, of all claim for tolls on way freight. Therefore the claim was confined to tolls upon property transported from Albany to Buffalo.

Charles G. Myers, (attorney general,) for the people.

L. Tremain and *A. C. Paige*, for the defendant.

By the Court, EMOTT, J. The magnitude of the interests and the importance of the principles involved in this cause, forbid our giving a formal or even a silent judgment. At the same time, the announcement that the parties will litigate the question to the last tribunal of appeal renders it unnecessary, and in our opinion inexpedient, that we should do more than briefly to indicate the grounds on which our judgment rests.

The action is brought to recover from the New York Central Rail Road Company tolls upon the freight which has been transported over its road since December 1st, 1851. Previous to that day the rail road companies to which the defendant succeeded, paid into the treasury of the state tolls at rates fixed by law, upon all the freight which it carried. Since that day no such tolls have been received from the large quantities of merchandise which have passed over these avenues of trade. The amount of the claim now made for these taxes or tolls is obviously very large ; it is put by the plaintiffs at \$5,000,000.

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The defense to this claim is, that the legislature, by an act passed July 10th, 1851, released all rail road corporations within the state from any liability to pay tolls upon freight, and repealed the existing statutes imposing such obligations upon them. The reply to this defense is, that this act of the legislature transcended their constitutional powers, and is void; and the question thus presented is of great importance in the legislation of the state.

The defendant is a corporation formed by the consolidation, under an act passed in 1853, of several existing rail road corporations. We assume, for the purposes of the present discussion, that the new corporation thus formed succeeded to all the rights and is subject to all the restrictions and obligations which are found in the charters of the companies from which it was composed, or in the various acts affecting them. At least, we assume that the New York Central Rail Road Company was bound to pay tolls in the same manner and to the same extent as were these companies, and stands in the same relation to the statute now in question as they would if they had continued separately to exist.

The right to carry freight from Buffalo to Albany, or over all the separate rail roads then composing the continuous line of railway from the lakes to the Hudson river, was conferred by an act passed May 7th, 1844. Some of these companies were indeed previous to that time authorized to carry freight, but others were not; and therefore no freight could before that time have been carried by rail road from Lake Erie to tide-water, so as to compete with the canals of the state. The right to carry freight upon these rail roads in competition with the canals was therefore in effect conferred by the act of May 7th, 1844, and by that act the rail road companies were required to pay to the state tolls on all the freight thus transported. These tolls were fixed by the statute at the same rates as the tolls upon the freight carried on the canals; and were directed to be paid to the commissioners of the canal fund.

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This act was in force, and these tolls were thus required and received, in the year 1846, when the present constitution of the state was framed and adopted, and on the 1st of January, 1847, when it went into effect. It may be observed, however, that it was not until May 12th, 1847, that a distinct appropriation of these rail road tolls was made to the canal fund, or that they were expressly declared to belong to that fund, and directed to be applied in the same manner as the canal tolls. The act releasing the then existing rail roads, and consequently the defendant, from the payment of these tolls, was passed as already stated July 10th, 1851, and went into operation December 1st, 1851.

The argument for the plaintiffs may be summed up thus: The act releasing the rail road companies, afterwards consolidated into the defendant's, from the payment of tolls, is unconstitutional; because, 1st, the constitution pledges to certain purposes all the revenues of the state canals; these rail road tolls were a part of the revenues of the canals, and to release them or discharge the rail roads from the obligation to pay them, was a violation of this pledge; 2d, because the constitution forbids the sale or disposal of the canals of the state, the rail road tolls were a part of the "canals of the state," and the release of them, or of the liability to pay them, was a disposal of a part of the canals.

With respect to the latter argument, it is sufficient to say that we perceive no reason or rule of construction which would authorize or require us to hold that the tolls payable by rail roads to the commissioners of the canal fund, constituted a part of the canals. If they are a part of the revenues of the canals, which is the fundamental proposition upon which the main argument for the plaintiffs rests, they are not a part of the canals. The revenues of a person, natural or artificial, are not the person, nor in any proper use of language a part of the person. It is not as one appellation including all which the canals may earn or produce, as well as what they are, that the word "*canals*" is used in the constitution. The

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phrase must be understood in its ordinary sense, meaning the material structures. Their ownership and possession will involve of course the right to their use, and any profit or income to be derived from such use. But these would pass with or belong to the canals from the necessity of the thing, because they are consequent upon their possession, and not because the revenue thus to be earned is a part of the canals themselves. The language of the constitutional provision cited (art. 7, § 6) is this: "The legislature shall not sell, lease or otherwise dispose of any of the canals of the state; but they shall remain the property of the state and under its management for ever." It appears to us very plain that this language refers to the structures of the canals. Its object is to preserve to the state in perpetuity the control as well as the profits and advantages to be derived from the transportation of property upon these great artificial avenues, so that these profits and advantages should enure to the benefit of the whole people. The alienation of the canals themselves, and not the disposition of any part of their revenues or of any funds appropriated to that support, is what is forbidden. For my own part I see no reason to suppose that if the pledges of the revenues of the canals which are contained in the preceding sections of this article do not forbid, the legislature may not make any disposition whatever of the revenue obtained from tolls imposed on freight transported on the canals themselves, without contravening in any respect this prohibition of the constitution. I suppose, farther, that a reduction of the tolls on freight carried on the canals, or of any of their direct and proper revenues to the minimum, or even to nothing, whatever might be the policy or the propriety of such a course, could not be successfully assailed as an unconstitutional sale or disposal of the property which this constitutional provision makes inalienable. Still less can such a reduction, or a relinquishment of charges upon other modes of transport, which had been imposed and applied to protect or to yield an income to the canals, be con-

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sidered in such a light. Such acts are rather acts of management of the canals, and this is expressly reserved to the state, to be exercised by its agents; and into the wisdom or expediency of this management, the courts are not to inquire. The counsel for the people invoked against the constitutionality of this statute the analogy of a mill, the title to which should be held by a trustee with a right to exact suit to the mill, or the exclusive right to grind for certain persons or property attached to it. It is said that a court of equity, at the instance of the cestuis que trust, would restrain a release of an adjoining mill from a toll which had been imposed as a condition of allowing its owner to deal with those who were thus bound. But we are not upon a question of trust, or of equity. Here are no cestuis que trust, and we have to determine, not what was equitable for the state of New York to do, but what its legislature—otherwise supreme—was forbidden to do, by its organic law.

The principal argument of the attorney general was made upon the other branch of the case. His reasoning rests upon two propositions: 1st. That the tolls required in 1846 by the then existing statutes to be paid to the commissioners of the canal fund, upon all property transported by these rail roads, were a part of the "revenues of the state canals," or the "surplus revenues of the canals," mentioned in sections 1, 2 and 3 of the 7th article of the constitution. 2d. That releasing or relinquishing these tolls, and allowing the rail roads to transport property without paying them, violated the provisions of these sections, which pledged or appropriated certain amounts of these revenues, first for a sinking fund to pay the interest and redeem the principal of the canal debt; next for a like sinking fund to pay the general fund debt, and then to defray the expenses of the state, and to complete the canals.

The first of these propositions presents a question of the meaning of words, or of the sense in which a particular phrase is used in the constitution of the state. The plain and

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natural import of the phrase "revenues of the canals," construed without reference to any extrinsic facts, would certainly be the revenues earned by or upon the canals. If it could be construed to mean any thing else, taken in connection with the fact that the canal fund, that is, the fund established for the support of the canals, is replenished from other sources of income, yet this is clearly its primary meaning.

Looking at the meaning of the phrase more narrowly, however, and looking at the instrument in which it occurs, we think that in this article of the constitution the words "revenues of the canals," wherever they occur, mean only the tolls received for the use of the canals, for transportation, and the rents received for the use of their surplus waters. Revenue is the yearly income of a government, or a person natural or artificial, from the property belonging to such government or person. Thus we speak of the revenues of the state of New York, of the New York Central Rail Road Company, and the like; and we may also speak of the revenues of any individual, although the word is not so often applied to individuals. The canals of this state, however, are not the state, nor are they a corporation, or a natural or artificial being, or possessed as such of property or income. The canals are simply public works, material structures, made and used for travel and transportation, and capable of yielding an income to their owners from such use. In a strict sense they have no revenues, because they have no recognized individual legal existence. Strictly speaking, the canals only yield a revenue; but it is the revenue of their owners, the state, or the people. In the part of the constitution now under consideration they are personified, as was observed by one of the counsel, and the revenues derived from the property which constitutes the canals, are spoken of as the revenues of the canals. It will be observed, however, that it is not *the canal fund* which is thus spoken of and personified, but *the canals*. In the 5th section of this article the revenues of the sinking funds are spoken of, and in such

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a manner and connection as to make it apparent that taxes laid to replenish these funds, are considered and intended as a part of their revenues. A fund is merely a name for a collection or an appropriation of money. It may be nothing but a designation of one branch of the accounts of the state, or of a certain amount of money when collected to be applied to a particular purpose. It may have no property and represent no investments, and what are called its revenues may include all the moneys appropriated or directed to be paid to it, or for its benefit, or that of the objects it represents. If the constitution had spoken of the revenues of the canal fund, its meaning and effect might have been different. But the canals themselves yield an income from their use, and that is their revenue, although the canal fund may have other sources of supply. But these sources of income or supply, and among them rail road tolls, when these are appropriated to the canal fund, do not become a part of the canals, nor are they the property of the canals; and therefore the revenue thence derived in any year is not a part of the revenues of the canals, even if it might, in a qualified sense, be spoken of as part of the revenues of the canal fund.

If it was otherwise, and the next position of the attorney general were correct, that these supplies of income are sacredly and perpetually pledged and protected, not only against the abstraction or the diversion of their proceeds, but against their diminution, any tax or toll which may be levied at any time by the legislature for the benefit of the canal fund would become at once irrevocable and altogether beyond legislative control.

We do not find in the facts and documents adduced to explain the meaning which has been given to this phrase, enough to shake our conclusion that the phrase, "revenues of the canals," does not include the tolls levied upon rail roads for the transportation of freight, under the statutes existing January 1st, 1847, and by the act of May 12th, in that year, expressly appropriated to the canal fund.

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But if we had come to a contrary conclusion on this point, we should be unable to agree to the doctrine which the attorney general deduces from the effect of the 7th article of the constitution upon these revenues. In the most favorable view which can be taken of this question for the plaintiffs, the tolls which were imposed upon freight carried by the rail roads can only be regarded as assimilated to tolls laid upon freight transported on the canals. It is conceding all which can be claimed, to consider these rail road tolls in the same class or category as canal tolls, as the tolls upon a particular class of freight, or the tolls upon a particular canal. If the rail road tolls are "revenues of the canals," they are certainly only a part of those revenues. There has never been any question, so far as I am aware, of the power of the legislature to regulate and graduate the canal tolls. Such a power has been repeatedly exercised or conferred upon the canal board. The tolls have been so graduated as to promote trade, or to increase the revenue, or both. It has indeed been suggested that the legislature would have no power to reduce the tolls, so that they would reduce the amount necessary to make the annual payments to the sinking funds. It is unnecessary to determine whether an exercise of legislative power which would have that consequence or effect, would be set aside ; because it is not alleged nor proved that taking away or releasing the tolls from freight carried on this rail road, would so diminish the revenues that these payments could not be made.

But the doctrine contended for goes far beyond this. It is announced in the brief for the People, as a pledge of all the revenues of the canals, at their highest revenue standard, to the payment of the public debt, and the completion of the canals ; and this means, in the argument against this law, a pledge that every class of tolls or revenue shall be kept at the highest standard. I find no such pledge in the constitution. All that its terms express by way of promise or pledge is that these revenues shall be applied in a certain way. It

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may be that this involves a pledge that these revenues shall be made to produce a sufficient amount to make the payments called for by the constitution if possible; for even a constitution cannot compel an impossibility, though it may demand a resort to taxation to repair the consequences of a course of action or a state of circumstances which has defeated its intention. I neither affirm nor deny that proposition: it is not what we are considering. The argument for the present prosecution demands more than this; it demands that all these tolls or taxes should be kept at the highest revenue standard. What is to be the measure of the highest revenue standard, and who is to apply it? Leaving out of the case the alleged obligation to raise an amount necessary to meet the payments to the sinking funds, because that is not involved in the present issue, it is very clear, at least to our minds, that the whole subject of the regulation of the tolls belongs to legislative discretion. This discretion must involve the complete control of the subject. It must include the right to modify, to increase, to diminish or to abolish any class of charges. It is for the legislature, and not the courts, to fix a tariff of tolls, to determine what articles may be transported free of toll, and what shall be charged upon others; what avenues of transportation shall be open at law, and what shall require heavy charges for their use, and whether the interests of the state require that freight shall be allowed to pass without charge over any of its public works, either those owned by the state or those competing with them. In the exercise of this discretion the legislature can consider all the interests of the state, commercial as well as financial, and in any particular statute or ordinance we are bound to presume that they have acted upon such considerations.

Where the constitution expressly, or by necessary consequence from its express provisions, either requires or forbids an act, there can be no hesitation in enforcing its mandate. But for myself, at least, I cannot agree to the doctrine which

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was urged upon us, of an implied prohibition of legislative action. I am not prepared to declare an act of the legislature void, because it is in conflict with what I may be led to suppose is the intent or the spirit of the constitution. Such a doctrine would be more dangerous than the most latitudinarian construction of express grants of power. The language of an express power, or an express prohibition, in a constitutional instrument, is comparatively plain, and presents a narrow question. Nor does it widen the field of discussion very much, to consider what powers are absolutely necessary to execute any express duty enjoined or authority conferred upon the legislature. But to permit the courts to control and annul legislative action according to their speculations upon the spirit or the intent of the constitution, would be at variance with all sound, not to say strict, principles of construction, and would invest judicial tribunals with new and dangerous powers. The people of the state in their sovereign capacity possess an absolute and uncontrolled power of legislation. By the constitution this legislative power of the people is conferred upon and vested in the legislature. There is no constituent body between the people and the legislature to whom power is reserved ; nor are there any reservations in the grant of power to the legislature, except the express prohibitions of the constitution. When an act of the legislature plainly conflicts with the express requirements or the express prohibitions of the organic law, it is the duty of the courts to arrest its execution. But it is only repeating what has been said by every judge who has ever considered the question of the constitutionality of an act of the legislature, even in cases where the question arises upon express provisions of the fundamental law, that their infraction must be plain and palpable.

This article of the constitution contains an express pledge of the application of the canal revenues, and any diversion of them to other purposes would undoubtedly be a violation of that pledge. But the law in question makes no diversion

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of these revenues, or of the tolls upon which it operates. It does not direct their use or application for other purposes than those specified in the constitution. It releases and relinquishes railway tolls altogether, and it is to our minds a pure question of legislative discretion, whether this should have been done or not. It is not even apparent that the abolition of these tolls will cause a deficiency in the revenues of the canal fund, or whether, if such a deficiency exist, it has been or can be supplied by increased tolls on property transported on the canals. However the facts may be in these particulars, the wisdom and policy of such legislation as that now under consideration, and its effect upon the public credit, and the public interests, are questions for the legislature and the people, and not for the courts. If we could interpose to prevent a misapplication of the revenues of the state, or of any of its works or funds, it does not follow that we can prevent the diminution or the destruction of any part of those revenues, even if we should think the latter course as much at variance with the spirit of the constitution as the former would be with its letter.

We have considered all the grounds upon which the act of July 10th, 1851, is attacked, and have thus briefly noticed such parts of the argument upon them as was necessary to explain our judgment. We are not convinced that the act in question is in violation of any part of the constitution, and therefore the defendant must have judgment in this case.

Judgment for defendant.

[DUTCHESS GENERAL TERM, May 13, 1861. *Emott, Brown and Scrugham*, Justices.]

CLARK and PERRY, *appellants*, vs. SMITH, *respondent*.

The intention of a testator to cancel or revoke a clause in his will, however strongly declared, is of no consequence, unless it be carried out by some act amounting, in judgment of law, to an actual cancellation or revocation.

A testator, having an only son, James W. Smith, devised certain real estate to his "son James W. Smith." After the execution of the will he, with a pen, erased from the clauses of the will containing the devise the name "James W. Smith," leaving the word "son" uncanceled. *Held* that neither the will, nor the devises to James W. Smith, were revoked by the erasures.

THE surrogate of Tioga county adjudged and decreed that a paper executed by Wait Smith, deceased, was his last will and testament, and that it was duly executed and valid. Also that no part of said will was revoked by the deceased during his lifetime; that the deceased, at the time of executing said will, was in all respects competent to make a last will and testament and to devise real estate, and not under any restraint. The surrogate admitted said will to probate, and it was recorded in his office as a will of real and personal estate.

Rachel Clark and Clarissa Perry, two of the children and heirs at law of the deceased, contested the will and appealed from the decision of the surrogate; and insisted that the surrogate erred in rejecting evidence offered by them, and in deciding that the second and fourth clauses in the will were not revoked by the deceased in his lifetime.

The second and fourth clauses were marked and contained erasures, when the will was presented to the surrogate, as follows, to wit:

"Second. I give and devise to my son [James W. Smith,]* to take possession after the death of my wife, two-thirds of the farm upon which I now reside and the buildings situated thereon. I also give and bequeath to my said [son James]* W. all my personal property, except my household furniture, which I also bequeath to my said [son,]* to take effect after the death of my wife.

Fourth. I give and devise to my said son [James W.]* all the rest and residue of my real estate, which I have not

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herein specifically devised and which I shall not have conveyed to my children or other persons during my lifetime, to take effect in possession on the death of my said wife; and in case the income of the property I have above bequeathed to my beloved wife Rachel, for life, shall not be sufficient for her support, I do hereby enjoin upon my son [James]* W. to supply any deficiency."

The proof showed the deceased never had but one son, and that his name was James W. Smith. The name of James W. Smith was not, nor was the word son, mentioned in any part of the will except the two clauses above set forth. The deceased kept possession of the will from the time it was signed by him, in the year 1859, except perhaps a day, until he died, in April, 1860; and the proof tended to show that the deceased made the marks or erasures in the second and fourth clauses of the will in the winter or spring of 1859.

The contestants proved, that in February or March, 1859, the will was opened and read through in the hearing of the deceased and at his request; that it was then perfect; but that the deceased then said James should have no more of his property, and asked the persons present to witness what he said; when one of them remarked to him, "then erase his name or alter it to suit yourself." Some other remarks were then made, but nothing further was done, and the will was put back into the trunk of the deceased with his other papers.

One witness testified that about April 1, 1859, she saw the will and discovered the marks or erasures on it, and talked with the deceased about them. The contestants offered to prove that in the same conversation the deceased admitted he made said marks, and that he made them with the intent and for the purpose of cancelling the second and fourth clauses of the will. The offer was objected to, on the ground that the deceased's declarations, not a part of the *res gestæ*, were inadmissible. The surrogate sustained the objection, and the contestants excepted.

* The words in brackets were crossed with a pen.

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The contestants offered to show that James W. Smith stated and admitted, shortly after the decease of his father, Wait Smith, and before the will was opened and read, that his father had informed him that he was going to cross out his name from the will, and give him no more of his property; and that said James W. Smith said he should be satisfied if he found it so. This offer was objected to, on the ground that what the deceased told James W. Smith was not evidence, and that the residue of the offer was immaterial. The objection was sustained, and the contestants excepted.

Harris Miller (a son-in-law of the deceased) testified, under objection, that "it was proposed by some one of them present at the time the will was read, that I should either write a new will, or fix it some way to suit him, and I objected, because I was a member of the family. I proposed that he should get Mr. Canfield to do it. I told him I could see Mr. Canfield, if it was his request. He consented to it, and I saw Mr. Canfield when he was returning past the house. I told Mr. Smith that Canfield would attend to it at any time. It was Amos Canfield, the executor named. I don't know that I told him what way Canfield said it could be done."

B. F. Tracy, for the appellants.

George Sidney Camp, for the respondents.

By the Court, BALCOM, P. J. I think we need not determine whether, if the testator had erased the word son in the second and fourth clauses of his will, only those two clauses or the entire will would have been revoked; and I also think we should not decide whether the surrogate erred in following the dicta of Judge Selden in *Waterman v. Whitney*, (1 Kern. 159,) in rejecting evidence that the testator admitted he made the marks or erasures in the second and fourth clauses of his will, with the intent and for the purpose of cancelling or revoking those clauses. I have come to the last mentioned

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conclusion for the reason that the rejected evidence would not have changed the case if it had been received. If the testator made the marks or erasures, in the second and fourth clauses of his will, with the intent and for the purpose of cancelling or revoking those clauses or the entire will, they did not effectuate such intention or purpose. They did not materially alter the sense or meaning of the will or either clause in it. If the will had been written without either of the words in it, which have been marked or erased, its meaning and effect would have been precisely the same they were before those words were mutilated. I take it to be clear that the intention of a testator to cancel or revoke a clause in his will, however strongly declared, is of no consequence, unless it be carried out by some act amounting in judgment of law to an actual cancellation or revocation. In *Martins v. Gardiner*, (8 Sim. 73,) the testator, by a clause in his will, directed his executors to set apart a fund sufficient to produce the annual sum of ten pounds, and to pay that sum into the proper hands of his sister, [*Elizabeth*,] the wife of Francis Betley of Yarmouth, in the county of Norfolk, butcher, for her life, or into the hands of such persons as the said Elizabeth Betley should appoint, to the intent that the same might be for the separate use of the said Elizabeth Betley; and he directed that the receipt of the said [*Elizabeth*] should be a sufficient discharge for the annuity; and he also directed his executors to divide the residue of his estate equally amongst his brother W. Gardiner and his sisters Sarah Gardiner and [*Elizabeth*] the wife of the said Francis Betley. The name Elizabeth was afterwards erased by the testator, wherever it occurs, as above included within brackets, and the question was whether the bequests to Elizabeth Betley (whose right name was Bateley) were revoked. The vice chancellor decided that, as the description, and in some places the name, Elizabeth Betley, remained uncanceled, the court was not warranted in holding that the bequests to her were revoked. Now in this case the word son remains uncanceled in the clauses wherein the name

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James W. Smith was erased, and as the testator had but one son and his name was James W. Smith, the devise to him have not been revoked. Sufficient words remain to make them as perfect and effectual as they were before the name James W. Smith was erased.

For the foregoing reasons I am of the opinion the testator did not revoke his will, or either of the mutilated clauses in it.

It follows that the decision of the surrogate should be affirmed.

Decision accordingly.

[BROOME GENERAL TERM, July 9, 1861. *Balcom, Campbell and Parker*, Justices.]

 KISSOCK vs. GRANT.

Where the affidavit on which a justice of the peace issues an attachment contains some legal evidence tending to show that the defendant has departed from the county where he last resided, with intent to defraud his creditors, it is sufficient to give the justice jurisdiction, and to uphold his judgment when attacked collaterally.

And the justice having jurisdiction, his error in subsequently issuing a summons, and holding the cause open until its return, will not render his judgment entirely nugatory.

Such a judgment, though erroneous, is regular and valid until reversed; and an execution issued thereon, and a sale of property upon it, will be regular and lawful, and will not become irregular or unlawful by the subsequent reversal of the judgment. PARKER, J. dissented.

ACTION brought to recover the value of property claimed to belong to the plaintiff, and alleged to have been wrongfully converted by the defendant. The defense was that the defendant caused the property to be taken and driven away by virtue of an attachment issued out of a justice's court, and that he caused the property to be sold by virtue of an execution issued on a judgment rendered in said attachment suit. The plaintiff's answer to that was, that the defendant

34	144
48	72
5L	114
47h	49
87a	61

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caused the property to be taken away under an attachment issued in favor of himself and one Hume, and caused it to be sold and driven away by virtue of an execution issued on the judgment rendered in said attachment suit. That the attachment was void for the reason that the affidavit was not sufficient to give the justice jurisdiction. That the judgment rendered thereon was void for the reason that the affidavit did not give the justice jurisdiction, and a summons was improperly issued on the return of the attachment and proceedings thereby stayed for six days, by which the justice lost his jurisdiction, if he ever had any; and that the judgment has been reversed and altogether held for nothing, thereby vacating all the proceedings, which reversal relates back, wipes out all trace of the proceedings, and they are no longer a protection to the person instituting them.

On the trial, the plaintiff proved the taking and carrying away of the property by one Bush, a constable, under the direction of the defendant, upon an attachment issued by F. W. Foote, a justice of the peace of Delaware county, in favor of the defendant Grant, and one Hume, against James Kissock. And the property was sold by said Bush, by virtue of an execution issued on a judgment in favor of said Hume and Grant, against Kissock, in the attachment suit. The plaintiff read in evidence the docket of the justice, in the suit before him, and the papers on which the proceedings were instituted; among which was the following affidavit made by Grant:

“Delaware county, ss: James A. Grant, jr., being duly sworn says, that James Kissock is justly indebted to him and Robert T. Hume, on a demand arising on contract, in the sum of fifty dollars, as near as this deponent can estimate the same, over and above all discounts which the said Kissock has against them, and the application for an attachment against the property of said James Kissock which accompanies this affidavit, is made on the ground that the said James Kissock has departed from the said county of Delaware, where he has

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lived, with the intent to cheat and defraud his creditors, as this deponent verily believes. And this deponent further says, that the facts and circumstances upon which he founds his belief, are as follows: That on the 25th day of January, 1858, said Kissock started from Hobart with a load of butter, for Catskill, for this deponent and R. T. Hume, in company with other teams; that said Kissock, previous to starting, stated to deponent that he wanted to start early in the morning, so that he could go to Catskill and back again in four days; that the other teams went out and back the same week on Friday or Saturday, and the said Kissock had not returned, as deponent was informed by the wife of said Kissock on Friday last, and deponent believes that said Kissock has not yet returned to this village, the place of his residence; said Kissock's wife informed deponent that she was afraid he had left her; that he told her he was going only to Catskill, and that if any thing happened that he could not come home at the usual time, he was in the habit of writing to her, and that she had not since he left received any letter or other intelligence from him. Deponent says that said Kissock bought a buffalo skin at the store of McNaught & Grant on the morning that he left, and he informed his wife that the same had been lent to him by the firm aforesaid, as she informed this deponent; and deponent further says, that said Kissock is considerably involved and in debt, and deponent verily believes said Kissock has not property sufficient to pay his debts; that deponent received a letter from R. T. Hume yesterday, written in New York, as appears by the date and postmark, Feb. 9th, 1858, in which deponent is informed and believes that some of the packages of butter sent by said Kissock had not at that time been received by him in New York, to which place the same was to have been sent by said Kissock; that deponent is informed by John Cowan, who returned from New York yesterday, that he did not see the said Kissock, although he looked after and tried to find him; and that he inquired at several of the public houses in Catskill, where said

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Kissock would be likely to leave his team, and the same could not be found; and deponent is informed and believes that the said Kissock, a few days before he left with the butter, had been collecting accounts which belonged to him and Alexander Stewart, and that he has not paid over any of said money to said Stewart; and deponent believes that the said Kissock has left the county of Delaware, his last place of residence, with an intent to cheat and defraud his creditors, and that there is danger of losing said demand, unless an attachment is issued against the said Kissock."

The attachment was issued February 11, 1858, and was returnable on the 19th of the same month. On the return day the plaintiff therein appeared, and on his request the justice issued a summons, returnable February 25th. On that day the defendant moved to quash the attachment, which motion was denied. The plaintiff filed his complaint. The defendant did not answer. After hearing the testimony of witnesses on the part of the plaintiff, the justice entered a judgment in his favor for \$56.65 damages and costs. And upon that judgment he subsequently issued the execution upon which the property was taken and sold. The plaintiff then introduced in evidence a judgment roll of the county court of the county of Delaware, in all things reversing with costs the said judgment rendered by the justice, filed in Delaware county clerk's office, September 16th, 1858. Also a judgment roll in the supreme court, on appeal, in the same case, from which it appeared that the judgment of the county court was affirmed. The justice, being examined as a witness, stated, on his cross-examination, that he held the case open from the return day of the attachment to the return day of the summons. The plaintiff having rested his evidence, claimed to recover on three grounds: 1st. The affidavit in the attachment suit was insufficient to give the justice jurisdiction, and that all process and proceedings therein were void, and no protection to the defendant who directed the taking and sale of the property. 2d. The summons issued

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was unauthorized by the statute, and the justice thereby lost all jurisdiction of the case, and proceedings thereon were therefore void. 3d. The said judgment having before the commencement of this action been in all things reversed, the reversal wiped out all the proceedings, and they were no longer a justification or protection to the defendant who directed the taking and sale of the property. The defendant by his counsel moved for a nonsuit; to which the plaintiff's counsel objected. The court granted the motion, on the ground that the several judgments and proceedings, though voidable were not void, and were a protection to the defendant, and that the plaintiff could not sustain the action, without proving a demand of the defendant of the property taken by virtue of the attachments and executions, after the reversal of the judgments and before the action was brought, and that the plaintiff had failed to make out a cause of action against the defendant; to which decision the plaintiff's counsel excepted. Whereupon the cause upon a bill of exceptions was ordered to be heard in the first instance at a general term, and that all further proceedings in the cause be stayed until further order of this court, &c.

A. Taylor, Jr. for the plaintiff.

William Gleason, for the defendant.

BALCOM, P. J. I am of the opinion the judgment of the justice was not void. The affidavit, on which he issued the attachment, contained some legal evidence which tended to show the plaintiff had departed from the county of Delaware, where he last resided, with intent to defraud his creditors. (*See Skinnion v. Kelley*, 18 N. Y. Rep. 355.) It was sufficient to give the justice jurisdiction, and to uphold his judgment when attacked collaterally; and having jurisdiction, his error in subsequently issuing a summons and holding the cause open until its return, did not make his judgment entirely

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nugatory. (7 Barb. 621. 7 Wend. 200.) It was regular, but erroneous; and was properly reversed for error. It was valid until reversed, and the execution issued thereon and the sale of the property in question, in virtue thereof, were regular and lawful—and did not become irregular or unlawful by the reversal.

In *Turner v. Felgate*, (1 Levinz's Rep. 95,) a man had a judgment and execution executed, and afterwards the judgment was *vacated* for being unduly obtained, and restitution awarded; then the defendant brought trespass against the plaintiff in the first action for the taking of the goods; and it was adjudged that it well lay against the party; for by the vacating of the judgment it is as if it never had been; *and is not like a judgment reversed by error*. But Justice Twysden said that he was not satisfied with this judgment when it was given, in the time of Glyn, chief justice, nor was he yet for making a man a trespasser by relation, for when the execution was served there was a judgment, though that afterwards the execution was vacated.

It was solely upon this authority that Comyn stated, in his Digest, "So if a man has color of an authority, and afterwards it is vacated and declared to be null, he will be a trespasser *ab initio*; as if a man obtains judgment irregularly, and afterwards takes out execution, the party (though not the officer) will be a trespasser, if the judgment be vacated." (7 Com. Dig. 499, 5th ed.)

The report of the case of *Felgate v. Tournier*, (1 Keble, 822,) shows that the first judgment against Turner or Tournier was set aside by rule, as irregular. (See 1 Keb. 453, 488.)

There can be no doubt but that a judgment or execution or other process that has been set aside for irregularity ceases to be any justification for acts done in virtue thereof by the party obtaining the judgment or suing out the execution or other process; and he will be liable for such acts as a trespasser *ab initio*. (*Chapman v. Dyett*, 11 Wend. 31. *Smith*

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v. *Snyder*, 15 *id.* 324. *Barker v. Braham & Norwood*, 3 *Wilson*, 368) But a party is never a trespasser or wrongdoer for selling property by virtue of an execution, in due form, issued upon a judgment regularly obtained, though the same be afterwards reversed for error, (1 *Cowen*, 622, 711 to 734, 735;) and he is not liable as a trespasser *ab initio* for causing process to be executed, which is regularly obtained, though erroneously granted, and subsequently set aside for error. (3 *Sand.* 323. 19 *Barb.* 283.)

“There is a marked distinction between judgments reversed for error and executions set aside for irregularity. In the latter case, the party is never excused, if the irregularity be such as renders the process void. One case is the fault of the party himself, the other is considered the error of the court.” When a judgment is reversed for error, “the execution is valid to the time of reversal. It confers a right on the sheriff to sell, and sanctions all legal acts done under it.” (1 *Cowen*, 734, 5.)

If the foregoing views are correct, the sale of the property in question was not wrongful but valid, because it was made by virtue of an execution in due form, regularly issued on a judgment, then in force, and which was valid until reversed for errors committed by the justice who rendered it. The defendant therefore is not chargeable for wrongfully taking or wrongfully converting such property; and the plaintiff was properly nonsuited.

The plaintiff could have had an order, upon the reversal of the judgment, that the money collected thereon be restored to him with interest from the time it was collected. (*Code*, § 369.) Perhaps he may yet obtain such an order; or it is possible he may recover such money of the defendant by action, or sue upon the attachment bond. But we need not point out his remedy if he has any—our present duty will be discharged when we have determined the case in hand.

It follows that the plaintiff's motion for a new trial in the action should be denied, with costs.

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CAMPBELL, J. concurred in denying the motion for a new trial.

PARKER, J. dissented, and delivered an opinion, in which he held that the judgment of the justice was void by reason of the insufficiency of the affidavit on which the attachment was issued.

Motion for a new trial denied, with costs.

[BROOME GENERAL TERM, July 9, 1861. *Balcom, Campbell and Parker, Justices.*]

 HAYES vs. REESE and others.

The interest of a partner in the partnership property, consists in his ratable proportion of the assets of the copartnership, after the payment of all its debts. In a suit in equity, for a settlement of the copartnership affairs, no decree can rightfully be made for the payment by one partner of any sum to another, except upon this basis.

A decree, upon a final accounting between partners, directing one to pay an ascertained balance to another, assumes that the sum so decreed has been duly ascertained to be due to such partner upon a full settlement of the partnership accounts, and after payment of all the partnership debts.

The character, description and amount of the partnership debts is a subject within the necessary and legitimate scope of the litigation which results in the recovery of a judgment by one partner against another, in such an action.

And if the partner against whom such judgment is recovered is subsequently compelled by legal process to pay partnership debts, to an amount equal to the sum remaining unpaid upon the judgment, this will not entitle him to maintain an action against his former copartners to have the amount of such partnership debts so paid by him ascertained, and for a decree directing that such amount be allowed to him as payment upon the judgment.

His only remedy, it seems, is by a bill of review, or a supplemental bill in the nature of a bill of review.

A PPEAL from a judgment entered at a special term, upon demurrer to the 1st and 3d answers of the defendant David Reese. The complaint alleged that on the 18th day of June, 1850, the plaintiff and the defendants, except David Reese,

34	151
36	95
33h	419
37a	7

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together with Michael Williams and John H. Ashley, entered into copartnership together as rail road contractors, and continued together as such until June 17, 1851, when said copartnership was dissolved, and a copartnership was then formed and the copartnership business was continued by the plaintiff and said defendants, except David Reese, until about January 19th, 1853. That on or about the 24th day of April, 1852, said Michael Williams commenced an action against the plaintiff and defendants, his copartners in the first firm, except David Reese and said John H. Ashley, for an accounting between said copartners, and while said action was pending, and on or about the 19th day of January, 1853, said John Reese commenced an action in the supreme court against the plaintiff and said Orville B. Eaton and Heman Miller, for an accounting between said copartners from June 17th, 1851. That both actions were referred to the same referee and tried together, and that the proofs were closed and the causes submitted on the 16th day of September, 1854. That the referee made his report in both actions on the 8th day of March, 1856, and on the 18th day of March, 1856, judgments were entered upon the reports of said referee against the plaintiff as follows: In the first named action, in favor of said John Reese for \$1777.14 debt, and \$168.25 costs; in favor of said Eaton for \$1786.52 debt, and \$24 costs; and in favor of said Miller for \$1871.93 debt. In the second named action, in favor of said John Reese for \$406.23 debt, and \$162.61 costs; in favor of said Miller for \$1031.62 debt; and in favor of said Eaton for \$553.52 debt. That all of said judgments were rendered for the defendants' share of the copartnership profits decided to be in the hands of the plaintiff; that said referee also decided that said Ashley had abandoned the contract, and forfeited all right to any share of the profits. The plaintiff further alleged, that at the time of said trials there was a large amount of debts owing by said copartnerships, but no provision was made for their payment, by the judgment, and no allowance was made to the plaintiff in any way

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on account of such debts. The plaintiff further stated, that he appealed from said judgments to the general term of the supreme court and thence to the court of appeals; and that the judgments were affirmed in both courts; and he has paid to the defendants, to be applied pro rata on such judgments, the sum of \$8000. That the money directed to be paid to the defendants, by said judgments, constituted the assets and profits of said copartnership, and the only assets; and the plaintiff since said trials has received no assets or profits of said firms, or either of them; and that the defendants, from the proceeds of said judgments, were in equity bound to pay the debts of said firms existing at the time of said trials. The plaintiff further alleged, that since said trials he has been compelled by legal process to pay and has paid all said copartnership debts, and that such debts thus paid by the plaintiff, together with interest upon the same, amount to as much as the balance owing by the plaintiff to the defendants on such judgments, and that such payments by the plaintiff are in equity payments upon said judgments. That no part of said copartnership debts were paid by the defendants, or either of them. That said Michael Williams died insolvent, leaving no property; and that said John H. Ashley and all the defendants except David Reese are utterly insolvent, and if the plaintiff is compelled to pay the balance owing on said judgments, he will be entirely without remedy. The plaintiff further alleged, that he had applied to the defendants to apply such payments upon said judgments, and they refused so to do. That the said judgments are fully secured by lien on real estate, and by sureties. The plaintiff further stated on information and belief derived since the commencement of this action, that said judgments had been assigned to the defendant David Reese by the other defendants, but at what time or upon what consideration, the plaintiff had no knowledge or information. Wherefore the plaintiff prayed, that by the judgment of this court it might be ascertained what was the amount of said copartnership debts which the plaintiff had paid since

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said trials, and that such amount might be allowed as payment upon said judgments, and that the plaintiff might be allowed the costs of this action; and that upon the payment of any balance owing upon said judgments after such allowance, if any, such judgments be declared "satisfied," and ordered discharged of record; that the defendants and their attorneys might be enjoined from collecting the balance owing on said judgments or either of them, until the further order of the court, and for such other and further relief as the court might deem equitable.

The defendant Reese in his answer alleged, that in and by the complaints in each of the actions mentioned in the complaint, a full and final accounting between the parties thereto as members of the respective firms in said complaint mentioned was demanded, and that it was also demanded in and by said complaint that the partnership assets should be applied, in the first instance, to the payment of the copartnership debts, and the residue distributed amongst the parties to said several actions, on the foot of such accounting. That said Hayes appeared by his attorney and counsel in each of said actions, and the parties thereto proceeded to, and had, a full and final accounting in each of said actions, in accordance with the prayers of the complaint therein. That said actions were fully and fairly tried and several judgments against the said John Hayes were rendered therein, in favor of the said Reese, Eaton and Miller, for the sums in said complaint mentioned. Second. That he, the defendant, had not knowledge or information sufficient to form a belief as to whether there was a large, or any amount of debts owing by said copartnerships, at the time of the trials of said actions, or whether since said trials the plaintiff had been compelled by legal process to pay or had paid any or what amount of said alleged debts, or whether the amount by the plaintiff alleged to have been paid was equal to the balance due on said judgments, or as to whether the said Michael Williams died insolvent, leaving no property. Third. That

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before the commencement of this action, the several judgments in favor of said defendants, Reese, Eaton and Miller, in said complaint mentioned, were for a valuable consideration assigned to the defendant Reese.

The plaintiff demurred to the first and third answers of the defendant Reese, for the reason that the facts stated in said answers, or either of them, did not constitute a defense to the action of the plaintiff.

The court, at special term, ordered that the plaintiff have judgment upon the demurrer, with leave to the defendant to amend on payment of costs, within twenty days. Whereupon the defendant Reese appealed.

Sherman S. Rogers, for the appellant.

J. C. Cochrane, for the respondent.

By the Court, E. DARWIN SMITH, J. The interest of a partner in the partnership property consists in his ratable proportion of the assets of the copartnership after the payment of all its debts. In a suit in equity for a settlement of the copartnership affairs no decree can rightfully be made for the payment by one partner of any sum to another, except upon this basis. A decree, upon a final accounting between partners, that one shall pay an ascertained balance to another, assumes that the sum so decreed has been duly ascertained to be due to such partner upon a full settlement of the partnership accounts and after payment of all the partnership debts. Such is the necessary force of the judgments recovered against the plaintiff in this action, set out and described in his complaint. It is stated in the complaint that "all of said judgments were rendered for the defendant's share of the copartnership profits decided to be in the hands of the plaintiff." There could be no *profits* till the debts were paid, or at least the amount could not be ascertained and legally declared. The character, description and amount of the part-

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nership debts, was a subject, therefore, within the necessary and legitimate scope of the suits and controversies which resulted in the recovery of the judgments aforesaid, against the plaintiff. It is a fundamental rule that the judgment or decree of a court of competent jurisdiction is not only final as to the subject matter thereby determined, but also as to every other matter which the parties might have litigated as incident to or essentially connected with the subject matter of such litigation. This rule applies to every subject within the legitimate purview of the original action, both in respect to matters of claim and of defense. (*Le Guen v. Gouverneur*, 1 *John. Cas.* 436. *Embury v. Conner*, 3 *Comst.* 511, 522. *Haire v. Baker*, 1 *Seld.* 357. *Davis v. Tallcot*, 2 *Kernan*, 184.) The answer of the defendant Reese is therefore clearly sufficient, and presents a complete defense to this action. The remedy for the plaintiff in respect to the matters set up in this complaint, I think, can only be had by a bill of review, or supplemental bill in the nature of a bill of review. (*Lube's Eq. Plead.* 170, 182. 3 *Hoff. Ch. Pr.* 8. 2 *Barb. Ch. Pr.* 90.)

The judgment of the special term should therefore be reversed, and judgment be given for the defendants, upon the demurrer.

[MONROE GENERAL TERM, December 3, 1860. *Smith, Johnson and Knox, Justices.*]

THOMAS *vs.* MURRAY and others.

Whenever a lender stipulates for the chance of an advantage beyond the legal interest, the contract is usurious.

When promissory notes of equal amounts are exchanged, one is equal in value to the other, and there is no usury in the transaction; but where either party makes an advantage in the arrangement, over and above seven per cent, then the case is one of usury, if the transaction was designed as, or was connected with, a loan of money.

Money is equal to money, in such a transaction, but nothing else is equivalent to money. Where, upon a loan of money, any thing else is claimed to be equivalent to money, the lender must show the equality; and where any other thing than money is put upon a borrower, on an exchange of notes, in connection with, and as a condition of, a loan of money, the transaction is presumptively usurious, in law.

The defendant applied to W. for the loan of \$200. W. said he had a note made by M. for \$150, payable in hemlock lumber, and if the defendant would take that note he, W., would let him have the \$200, and take the defendant's note for \$350. The defendant replied that he did not want the M. note, and did not consider it good. Subsequently the defendant told W. that if he would let him have the \$200 that day, he would take the M. note, provided W. would guaranty it. This W. agreed to do, and thereupon advanced the \$200 in cash to the defendant, and delivered the M. note, with a guaranty indorsed, guarantying the collection thereof, but without any consideration therein expressed, and took from the defendant a note for \$356.97, which embraced the interest on the \$200 and on the \$150 note, &c.

Held that even upon the assumption that W. was responsible upon his guaranty of the M. note, and that he could not elect to avoid it, the transaction was usurious upon its face, within the case of *Cleveland v. Loder*, (7 Paige, 559.)

But that the contract of guaranty was of no validity, for want of a consideration being expressed therein, and that the note for \$150 being turned out by the lender, upon a void agreement of guaranty as part of the consideration for a loan of \$200, the transaction presented a bald case of usury.

Held, also, that the fact that the agreement of W. to guaranty the note meant a *valid* guaranty, did not alter the case. That the contract being executed at the time, and not executory, must be held to express the agreement between the parties, and to furnish, upon its face, the only evidence of the contract actually made.

Held, further, that in an action upon the note given by the defendant to W. it was erroneous for the judge to charge the jury that the transaction would not be usurious if, at the time, W. supposed and believed that the M. note was a good note and the parties to it able to pay it, and the bargain between them was a genuine bargain for the sale of the note only, and without any intent to evade the statute.

And that the judge should have left it to the jury to say whether it was part

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and parcel of the bargain, and the intention of the parties, that the borrower should take the \$150 note at his own risk in regard to the solvency of the parties thereto.

One who makes a contract which the law declares usurious, cannot escape the penalty of the offense upon the plea of ignorance of the law, or of the absence of an intention to evade the statute.

The law considers that every man intends the legitimate consequences of his acts.

A PPEAL by the defendants from a judgment entered at a special term, upon the verdict of a jury. The action was brought to recover the amount of a promissory note for \$356.97 made by Murray and Mattimore, and indorsed by the other defendants, dated September 16, 1857, and payable two months after date at the Atlantic Bank in the city of New York. The answer sets up the defense of usury; alleging a corrupt agreement between the makers of the note and James M. Wood one of the indorsers, by which it was made a condition of a loan of \$200 by Wood to Murray and Mattimore that they should pay \$6.97 for the use of the money, which was more than the legal interest, and take a worthless note made by one F. W. Morrow, who was insolvent, for \$150, payable in hemlock lumber, and give their note for \$356.97, and that Murray and Mattimore did receive the said \$200 and the said \$150 note, and give their note for \$356.97, in pursuance of the said agreement. It appeared from the evidence, that as a part of the agreement for the sale of the Morrow note, Wood agreed to guaranty it, and that a guaranty was indorsed on the note by Wood, without expressing any consideration. The evidence on the part of the plaintiff showed that the \$6.97 included in the note was for interest on the note and for money which was due from Murray and Mattimore on a previous transaction. The evidence also showed that Murray and Mattimore agreed to take the Morrow note because Murray, who was street commissioner of the village of Corning, wanted to use hemlock plank in making sidewalks, and that Wood at the time of the transaction believed the Morrow note to be perfectly good

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for its full amount. The court charged the jury that if they should find from the evidence that the note in question included interest at the rate of one per cent per month, or that it was made upon an agreement to pay that rate of interest or any rate of interest greater than seven per cent, such note would be usurious and the plaintiff could not recover. That the sale of the Morrow note to the defendant, at the time of making the loan would not render the transaction usurious if Wood, who sold the note to the defendant at the time of the sale supposed and believed that it was a good note and that the parties to it were able to pay, and the bargain between them for the sale and purchase of such note was a genuine bargain for the sale of the note only, and without any intent to evade the statute of usury, although the note turned out to be worthless and the purchase was part of the transaction and a condition of the loan. To this part of the charge the defendant's counsel excepted. The court further charged the jury that if Wood at the time of the agreement to sell the note and make the loan, and at the consummation thereof, believed the note good for the amount, and the parties to it able to pay, and promised to guaranty the collection thereof; the fact that he indorsed a void guaranty upon such note would not of itself render the transaction usurious, even if Wood knew at the time that the guaranty was not binding upon him. That the promise to guaranty was a promise to give a valid guaranty, but the indorsement of an insufficient guaranty intending to evade the effect of such promise would not render the transaction usurious, if there was no intention to evade the statute of usury coupled with it. To this part of the charge the defendant also excepted. The defendant's counsel then requested the court to charge the jury that if they found that the defendant made application to Wood for the loan of \$200, and that Wood exacted and imposed as a condition of the loan that the defendant should purchase the Morrow note of \$150 and give the note in question, and the defendant in compliance with such exaction and condi-

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tion took the note and accepted the loan and gave therefor the note in question, that alone would render the transaction usurious, unless the plaintiff should show that the \$150 note was in reality worth at the time the amount for which it was given. The court refused so to charge, and the defendant's counsel excepted. The defendant's counsel also requested the court to charge the jury that if they found as stated in the foregoing proposition, and in addition thereto that the said note was worthless, the transaction was usurious, although Wood at the time had no knowledge that the note was worthless but supposed it perfectly good for the amount. The court refused so to charge, and the defendant's counsel excepted. The jury found a verdict for the plaintiff for \$414.09, being the amount of the note and interest.

George B. Bradley, for the appellants. I. The court erred in charging the jury that if Wood, at the time of the transaction of making the loan, believed the Morrow note good and promised to guaranty its collection, the fact that he indorsed a void guaranty upon it would not render the transaction usurious; that the indorsement by Wood of a void guaranty, with intention to evade liability, would not render the transaction usurious if there was no intention to evade the statute of usury coupled with it. The statute provides that "no person shall directly or indirectly take or receive in any way a greater sum than seven per cent per annum for the loan or forbearance of any money, goods, things in action, &c. And that all notes &c., whereby there shall be reserved or taken any greater sum or value, shall be void." The Morrow note was worthless. The agreement of Wood to guaranty, was that he should make a valid guaranty. The court so held. The inducement to Murray to accept the loan upon the terms imposed, was the promise of Wood to guaranty the collection of the chattel note, and Murray supposed Wood had made a valid guaranty, while Wood, knowing its invalidity, made it with intent to evade liability.

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The intent of Wood was to deprive Murray of the amount of the Morrow note, in case it was not collectible of the maker. To that extent, then, Wood intended to be relieved of a hazard, and so far intended to get, and got, that much over the legal rate of interest. The intention of Wood to deprive Murray of, or take from him in any event a greater sum than the legal rate of interest, over and above the amount received by Murray of Wood, would be an intent, to that extent, to reserve a greater sum than legal interest. Therefore the intent of Wood, in the transaction to make an invalid guaranty, legally fastens upon him the intent to violate or evade the statute of usury. When a party knowingly takes or reserves in any form more than the legal rate for a loan or forbearance, the law fixes the intention. (*Steele v. Whipple*, 21 *Wend.* 103. *Read v. Coale*, 4 *Ind. R.* 288. *Scott v. Lloyd*, 9 *Pet.* 418.) And this is so whether he takes such excess in money or chances, however uncertain, for any advantage or benefit; and it follows that the same would be the case if the party should take such excess in being relieved from or evading a burden or hazard. (*Cleveland v. Loder*, 7 *Paige*, 557-9. *Barnard v. Young*, 17 *Vesey*, 44. *Chippendale v. Thurston*, 4 *Car. & Payne*, 98; 1 *Mood. & Malk.* 411. *White v. Wright*, 3 *Barn. & Cress.* 273.) In this case Wood intended by the transaction to get the full amount of this chattel note, and not only be relieved from any burden or contingency in its collection, but actually intended by his guaranty to evade liability in case the note should not be collected, and all this, too, in addition to the legal rate of interest on the entire amount of both the sum loaned and the chattel note. This rendered the transaction usurious at law, and fastened upon Wood the intention to violate the statute.

II. The court erred in refusing to submit to the jury and charge them as first requested. This chattel note was not commercial paper, it was not due at the time of the transaction, and of course not convertible into money. The defendant applied for a loan of \$200 in money merely, and the taking

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of this chattel note at \$150 was imposed and exacted by Wood as a condition of the loan. That note was payable in hemlock plank at a fixed price. The defendant took the note to get the loan, and gave the note sued on, including the several amounts, with interest. (1.) The transaction rendered the note usurious, because Wood, by this compliance with the condition, imposed upon the defendant the burden of collection of the note and the hazard of the ability of the maker to pay it when it should become due, and thereby Wood relieved himself from that burden and hazard, and realized whatever it was worth in addition to the legal rate of interest and without allowing the defendant any thing for it. (2.) Wood also relieved himself from any hazard of loss by reason of change or reduction in market value of hemlock lumber at the time the note should become due. (*See cases above cited.*) (3.) The only chances of getting the money on the chattel note, if paid at all, depended upon the fact that the lumber should be worth as much or more than \$7 per M., and if worth less than that sum, such property at a reduced value only could be expected. So there was a chance of getting less than \$150 on the note, but no possibility of getting more than that sum. (4.) The effect of the transaction was therefore that Wood should have and the defendant should allow \$7 per M. for the hemlock lumber, whether worth that sum or not, as a condition of the loan. This is usury. (*See cases above cited.*) (5.) It does not appear that hemlock lumber was worth \$7 per M. at the time of the transaction, and that will not be presumed. The price fixed by the note is no evidence of its value, but only fixes the price that the owner of the note was bound to allow without any regard to value. The taking of the note as a condition of the loan having been imposed and exacted, thereby requiring the defendant to take hemlock lumber at a price fixed by Wood, the burden of proof was upon the plaintiff to show that it was worth the sum fixed by the note, and having failed to show this, the transaction will be deemed usurious. (*Har-*

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greaves v. Hutchinson, 2 *Ad. & E.* 12. *Davis v. Hardacre*, 2 *Campb.* 375. 2 *Parsons on Cont.* 387.) This was held by Lord Ellenborough, to be the rule in all cases where a borrower is compelled to take property, and it certainly should be so where the lender fixes the price at which the property must be taken by the borrower. (*Davis v. Hardacre*, 2 *Campb.* 375.)

III. The court also erred in declining to charge as further requested by the defendant's counsel. The fact that Wood imposed and exacted as a condition of making the loan, that the defendant should take this chattel note, with the fact that the note was entirely worthless, renders the transaction usurious. (*Seymour v. Strong*, 4 *Hill*, 255. *Lowe v. Waller*, *Doug.* 736. *Barker v. Van Sommer*, 1 *Brown's Ch.* 148. *Davidson v. Barnard*, 1 *Esp.* 11; *Id.* 40. *Pratt v. Adams*, 7 *Paige*, 615.) And that is so, whether or not Wood had knowledge that the note was worthless. (*Gale v. Grannis*, 9 *Ind. R.* 140. *Morgan v. Schemerhorn*, 1 *Paige*, 544.) The chattel note not being due at the time of the transaction was not worth \$150 if good, and Wood knew that he could not then sell the note for that sum. (*Morgan v. Schemerhorn*, *supra.*) Wood having coerced the taking of the note as a condition of the loan, was legally chargeable with knowledge of its worthless character, and cannot relieve himself by saying that he had not such knowledge.

IV. The rule adopted by the court in the charge and refusal to charge is intolerable, in view of the evil sought to be remedied by the statute of usury. It will give the usurer almost unlimited power to speculate out of the necessity of the borrower, the exercise of which this case presents a signal example.

George T. Spencer, for the respondent. I. The alleged usurious transaction was between Murray and Mattimore, the makers of the note, and Wood, one of the indorsers. Inasmuch as the evidence tended to show that the sale of the

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Morrow note was made to Murray and Mattimore because they wanted the hemlock plank in which it was payable, and also that Wood believed the note good for the full amount, it became a question for the jury whether the sale of the Morrow note was a genuine bargain and sale, and made without any intent to evade the statute against usury, and this question was fairly submitted to them, and they were properly instructed that if no such intention existed in the case supposed, the transaction was not usurious. The taking a note for a loan of money and the price of a chattel or a chose in action sold at the same time, is not per se usurious. To make the transaction illegal on this ground, it must be made to appear that it secures to the lender more than legal interest, and that the sale of the chattel or chose in action was made with the intent, under the cover or disguise of the transaction, to secure illegal interest; and when the lender in fact obtains more than legal interest, it is competent for him to show that it was done unintentionally and through a mistake of calculation or of fact. (*New York Firemen's Ins. Co. v. Sturges*, 2 Cowen, 664. *Same v. Ely*, Id. 678, 704. *Archibald v. Thomas*, 3 id. 284. *Farmers' Loan and Ins. Co. v. Clowes*, 3 Comst. 470. *Leavitt v. De Launy*, 4 id. 364. *Mumford v. American Life Ins. Co.*, Id. 463. *Bull v. Rice*, 1 Selden, 315. *Booth v. Swezey*, 4 id. 276. *Schermerhorn v. Talman*, 14 N. York Rep. 93, 116. *Nourse v. Prime*, 7 John. Ch. 69. *Pratt v. Adams*, 7 Paige, 615, 632. *Seymour v. Marvin*, 11 Barb. 80. *Marvine v. Hymsers*, 2 Kern. 223, 231, 236.)

II. The agreement to guaranty the Morrow note, though it may have been designedly drawn so as to be invalid, is evidence of the absence of any intent to evade the statute; and if the makers of the note accepted the guaranty, supposing it to be valid, this is still further evidence of the absence of any corrupt agreement. If Murray and Mattimore took the Morrow note, relying on the guaranty of Wood, the transaction thus became the obligation of one party for that of the other

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for an equal amount, which is perfectly valid, though the obligation of one party is depreciated or worthless while that of the other is good and available for the full amount. Neither can a corrupt usurious agreement exist without the concurrence of both parties. (*Schermerhorn v. Talman*, 14 *N. Y. Rep.* 93, 118. *Aldrich v. Reynolds*, 1 *Barb. Ch.* 43. *Condit v. Baldwin*, 21 *Barb.* 181.)

III. The value of a promissory note or other chose in action is presumptively the sum expressed on its face, and if any party seeks to depreciate it, the burden of proof is on him. But when the value of a chattel is in controversy, it is always to be established by evidence. It was not necessary, therefore, in any view of the case, for the plaintiff to show that the Morrow note was good for the amount. The answer alleges the insolvency of Morrow, and the affirmative of that issue is with the defendants. But if Wood, at the time of the transaction, acted in the belief that Morrow was solvent and his note good for the full amount, it was entirely immaterial how the fact was. The court therefore properly refused to charge the jury as requested by the defendants' counsel in either particular. (*Schermerhorn v. Talman*, 14 *N. Y. Rep.* 93, 116, 118. *Aldrich v. Reynolds*, 1 *Barb. Ch.* 43. *Condit v. Baldwin*, 21 *Barb.* 181. *Sedgwick on Dam.* 488. *Ingalls v. Lord*, 1 *Cowen*, 240.)

By the Court, E. DARWIN SMITH, J. Upon the face of the transaction, as it appears upon the undisputed evidence given on the trial of this action, it seems to me to present a clear case of usury. The defendant Murray, in the fore part of the month of September, 1857, applied to the witness Wood, who was then keeping an exchange and banking office at Corning, for the loan of \$200. Wood said he had a note against one Morrow for \$150, payable in hemlock lumber, and if the defendant would take that note he would let him have the \$200 and take the note of the defendants for \$350. Murray told him he did not want the Morrow note, and that

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he did not consider it good, and that he would try and raise the money in some other way before he would take it. A few days afterwards Murray went again to Wood's office, when Wood asked him if he had concluded to take the Morrow note. Murray told him if he would let him have the \$200 that day he would take the Morrow note, provided he would guaranty it. This Wood agreed to do, and then advanced the \$200 in cash, delivered the Morrow note with a guaranty indorsed guarantying the collection thereof, without any consideration therein expressed, and took from the defendant the note in suit for \$356.97, at two months. This \$356.97 embraced interest on the \$200 and on the \$150 note, with some items of exchange not improperly included, as Wood states the facts. The Morrow note was dated May 20th, 1857, and was payable on the 1st of October thereafter, in hemlock timber, in plank at \$7 per thousand. Upon the assumption that Wood was responsible upon his guaranty of the Morrow note, and that he may not elect to avoid it, it seems to me that the transaction is usurious upon its face, within the case of *Cleveland v. Loder*, (7 Paige, 559.) He stipulated for an advantage over and above seven per cent on the loan of this \$200. The note is for \$356.97, and includes interest on the \$200, and interest on the \$150 note treated as cash and upon interest from the date of the note, September 16, 1857. The Morrow note did not carry interest, and therefore the amount of it was put upon interest 17 days—fourteen and the three days of grace—before it fell due. Then the Morrow note was payable in *lumber*, not in *money*. If this note had been payable in money, then aside from this question of the interest on it for seventeen days, it would have been virtually nothing more than the exchange of the plaintiff's note or liability for that of the defendants to the amount of the \$150, which would have been an entirely lawful transaction. But by taking the defendants' note for \$350, embracing this note payable in cash with interest, Wood stipulated to turn this lumber note into money and relieve

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himself from all risk in regard to the value of the lumber. All he would have been bound to do, upon his guaranty of Morrow's note, would have been to see that the lumber was delivered upon it when due, whatever might have been its value at the time. If the lumber, on the 1st of October, was worth \$5 or \$6 per 1000 feet, instead of \$7, Wood, if Morrow failed to pay it, would have made that difference had he fulfilled this contract for Morrow at that time, by force of the transaction, and would have saved a loss of that amount provided he had kept the note. He made a contract which secured to him cash for this \$150 note without any risk of loss in respect to the price or depreciation of the lumber, or any loss or risk attending the sale thereof, or any contingency connected with the property. In *Cleveland v. Loder*, Chancellor Walworth says, "Whenever the lender stipulates for the chance of an advantage beyond the legal interest, the contract is usurious." The lender here secured the advantage of turning lumber into money at a fixed price, probably much above its actual value, without any risk or contingency. This is not the case of a sale of property; for a man cannot sell his own note, or paper made or indorsed or guarantied by him. (*Schermerhorn v. Talman*, (14 N. Y. Rep. 117.) The question what was the value of the lumber does not, I think, legitimately arise, within the cases of the *Dry Dock Bank v. The American Life Insurance and Trust Co.*, (3 Comst. 358,) for this is not the case of a sale of lumber *in presenti*. If the lumber had been taken and delivered at the time, as a condition of the loan, instead of the note, the question of its value would be material, and the usury, if any, would consist in securing to the lender the difference between its actual value and the price paid or stipulated for in the contract. The case, so far as relates to the \$150, supposing it guarantied by Wood, is in the nature of an exchange of securities. In *Dey v. Dunham*, (2 John. Ch. 182,) it was held that if, on the exchange of notes, one party reserved a commission greater than seven per cent, the transaction would be usuri-

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ous. In *Fanning v. Dunham*, (5 *John. Ch.* 122,) the parties exchanged notes and one reserved $2\frac{1}{2}$ per cent commissions, and the transaction was held usurious, and the same was held also in *Dunham v. Dey*, (13 *John.* 40,) and also in *Kent v. Lowen*, (1 *Camp.* 177.) If the sale or exchange of this Morrow note had been *unconnected* with a loan of money, the case would have been essentially different. It is not the case of a sale of a valid chose in action for less than its face, within the cases of *Cram v. Hendricks*, (7 *Wend.* 569,) and *Rapelye v. Anderson*, (4 *Hill*, 472.) The application to Wood was for a loan of money. The transaction was purely a loan of money, and this note was imposed and put upon the defendants in connection with and as a condition of a loan of money, and a security, the \$350 note in suit, taken for the whole amount. This consideration, I think, was controlling in the cases of *Lowe v. Waller*, (*Doug.* 739,) *Ketchum v. Barber*, (4 *Hill*, 224,) and in numerous other cases. When notes in equal amounts are exchanged, one is equal in value to the other, and there is no pretense of usury in the transaction; but where either party makes an advantage in the arrangement, over and above seven per cent, then the case is one of usury, as I understand the cases, if the transaction was designed as, or connected with, a loan of money. Upon this principle I think this case one of usury, because the Morrow note was not equal to the defendants', it not being payable in money. Money is equal to money in such a transaction, but nothing else is equivalent to money; and where upon a loan of money any thing else is claimed to be equivalent to money, the lender in such a case, I think, must show the equality; and where any other thing than money is put upon a borrower in an exchange of notes, in connection with and as a condition of a loan of money, I think the transaction presumptively usurious in law. (*Davis v. Hardacre*, 2 *Camp.* 375. 2 *Parsons on Cont.* 387. *Swartwout v. Payne*, 19 *John.* 294.)

In this view of the law of the case, the refusal of the circuit judge to charge as requested on this point was error, and

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the exceptions for such refusal well taken in respect to both requests to charge. The transaction appearing confessedly to be one of *loan*, there was no question of fact for the jury until the plaintiff attempted some explanation by evidence tending to repel the presumption of usury.

But there is another view of the case which seems to me more satisfactory upon the facts. The evidence in the case shows quite conclusively that this Morrow note was in fact worthless; that the parties to it, at the time it was turned out to the defendants, were entirely insolvent and had been so, the maker for six years and the indorser for several years. It appears, also, that Wood had tried to trade off the note before he transferred it to the defendants, for a buggy, and could not trade, although the owner of the buggy desired to sell it, and that at the time when Wood proposed to turn it out to the defendant Murray, the latter told him "that he did not consider it good," and also told him he did not want the note, and did not think he could use it, &c. In view of these facts it seems to me quite clear that Wood intended, in making the loan of the \$200, to get on such loan, out of the defendants, the sum of \$150, the amount of the Morrow note, in addition to the interest on the money loaned, if the note proved worthless. His desire to part with it and his insisting on the defendants' taking it with the \$200, implies upon its face that he regarded it as certainly a doubtful debt, or at least not equal to money. The contract then, upon its face, in this view, was a contract to loan \$200, and to turn out a worthless or doubtful note for \$150, and take the defendants' note for the sum of \$350 and interest. This \$150 was thus taken for and upon the loan of \$200 for the consideration of such loan and as a condition thereof, and for the forbearance of this \$200 two months. In this view of the facts they present a clear case of usury. But it is said that the contract is not usurious in this view, because Wood agreed to guaranty the note, and that such agreement of guaranty meant a valid guaranty, and so the learned judge charged at the cir-

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cuit. This would undoubtedly be so if the contract were executory. But it was in fact executed at the time, and becomes necessarily its own expositor. The contract of guaranty was written on the note at the time and in the presence of the agent and parties, and prima facie must be held to express the agreement between the parties, and furnishes upon its face the only evidence of the contract actually made. Neither party can contradict it, and except in a case of mistake or fraud neither party can vary or reform it, either in law or equity. It is not proved or alleged that there was either error or mistake in the making of the contract of guaranty, and it must therefore be deemed, in a legal point of view, the true contract between the parties. This contract is confessedly invalid upon its face, and it therefore appears that this note was turned out upon an agreement of guaranty which both parties knew or were bound to know, at the time, was utterly void. Neither party can be permitted to allege ignorance of the law, and certainly Wood cannot, for it is conceded on this argument and was assumed on the trial and in the charge of the judge, that he knew that this contract was of no validity. It is then to be considered, in this view of the case, as no contract. It has no force as a contract, and the case, stripped of this pretense of a contract of guaranty, presents a bald case of usury, upon the assumption that this doubtful or worthless note of \$150 was put upon these defendants as part of the consideration for the loan of \$200.

But it is said that though Wood knew that this guaranty was invalid, there was no intent to evade the statute of usury, and this is the point on which the case obviously turned at the circuit. But this will not do. This man Wood cannot be let off upon the ground that he intended to commit a *fraud*, but not usury. If he knew his contract of guaranty to be invalid, he knew also, and the defendants also must be presumed to have known what was the legal effect of the transaction, and that he was to get this \$150, or might get it for nothing, out of these defendants. That constitutes usury,

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and a man who makes a contract which the law declares usurious cannot escape the penalty of such offense upon the plea of ignorance of the law, or of the absence of an intention to evade the statute. The law considers that every man intends the legitimate consequences of his acts. In a large number of cases of adjudged usury there was an unquestioned ignorance in point of fact of the legal effect of the contract. Such was the case of *The New York Firemen's Insurance Co. v. Ely*, (2 Cowen, 678;) and *The Bank of Utica v. Wager*, (2 id. 712, 769; 8 id. 398;) and *Cleveland v. Loder*, (*supra*,) and *The Dry Dock Bank v. The American Life Insurance Co.*, (*supra*,) and many other cases. But the statute of usury cannot be evaded in this way. All agreements, which in legal effect give to the lender of money any profit or advantage, certain or contingent, more than at the rate of seven per cent interest, violate the statute. It is not necessary to allege or prove, aliunde, any particular *intent* or special corruption in such a case. It is usury upon its face, and the court must so decide as matter of law. It is only when the true character of the transaction is equivocal, whether it be a case of bargain and sale or a loan and a device for usury, that the question becomes one of fact and belongs to the jury. In this case the legal inference of usury upon the face of the transaction is met by the claim, on the part of the plaintiff, that so far as relates to this \$150 note, the contract was in fact one of bargain and sale. This was the view taken of this question by the learned judge at the circuit, and this brings us to the exceptions to the charge. The theory of the charge is that the note was the subject of sale as valid business paper in the hands of Wood, the guarantee thereon being void, and that therefore there could be no usury in the sale of such note. The first branch of the charge of the judge at the circuit I therefore think was erroneous in this, that he said to the jury that the transaction would not be usurious, if at the time of the sale Wood supposed and believed that it was a good note, and the parties to it were able

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to pay it, and the bargain between them was a bargain for the sale of this note only, and without any intent to evade the statute, &c.; and that it omits to leave it, in the same connection, to the jury to say whether it was part and parcel of the bargain and the intention of the parties at the time, that the defendant should take such note at his own risk in regard to the solvency of the parties thereto. If that had been embraced in the charge, this part of it would have been substantially right; but as it stands, this question in regard to the bargain, and which would have had doubtless an important influence with the jury, was entirely excluded from their consideration. Upon this question the jury would have been entitled to look beyond the form of the transaction, and to take into consideration all that was said and done at the time of the trade, the void guaranty and all other facts which are part of the *res gestæ* of sale. Upon this point, of the sale of the note, the question would necessarily arise whether Murray understood and expected that he was to have a valid guaranty of the note. If he did, and that was the real contract, there could be no genuine bargain for its purchase and sale, and the jury could not have so found as a question of *fact*, looking at the real intention of the parties. Upon the charge to the jury, I think they might have found that there was an actual sale of the note upon the agreement of Wood to guaranty it. I think therefore there should be a new trial.

New trial granted.

[MONROE GENERAL TERM, December 3, 1860. *Smith, Johnson and Knox, Justices.*]

MOORE vs. BURROWS and others.

Where a contract is entered into for the conveyance of land on the payment of the purchase money, the estate vests, in equity, in the vendee, and the vendor retains the legal title as a mere lien or security for the unpaid purchase money.

Upon the decease of the vendor, his interest in the contract is personal property, and goes to his personal representatives. It will pass by assignment, with or without seal, like a bond and mortgage, and it may be sold as personal property, by his executor or administrator. JOHNSON, J. dissented.

And upon the sale of such a contract, by the administrator of the vendor, the purchaser thereof will have a right to receive the moneys remaining due on the same at the death of the vendor.

An assignment, by the vendee, of such a contract, will convey to the assignee all his interest therein, and entitle the assignee to demand and receive a conveyance from the heirs of the vendor, upon payment of the purchase money due thereon. JOHNSON, J. dissented.

The heirs of the vendor take the title by descent, as a mere security in equity for the payment of the debt. The debt is due to the executor, and the lien is held by the heirs in trust and simply as a pledge or security for its payment. On payment of the debt, the heirs are compellable, in equity, to execute the trust by a conveyance of the title.

APPPEAL by the defendants from an order made at a special term, whereby judgment was ordered for the plaintiff upon separate demurrers of the defendants to the complaint, with leave to the defendants to answer on payment of costs. From the complaint, it appears that in March, 1857, one William Burrows was the owner of a piece of land in the city of Rochester. He had received a deed of it *to himself alone* from the former owner. During that month he and his wife executed an agreement with one Josiah W. Burrows, one of their sons, by which they agreed to sell him the said land for \$1000, in twenty annual installments, without interest. William Burrows and his wife both died prior to October 16, 1858. On that day the said Josiah W. Burrows assigned the contract to the plaintiff. On the 20th day of October, 1858, Josiah W. Burrows was duly appointed administrator of &c. of the said William Burrows, and on the 7th day of March, 1859, at public auction, sold

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5h	8
9h	44
34a	103
44a	610
46a	63
63a	303
77a	607

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65h	41

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said contract, as such administrator, to John Thompson, jun. Prior to the commencement of this action, the said Thompson expressly waived any tender of the amount due on the contract. The children of William Burrows have all, with the exception of Herbert Burrows, one of the defendants, and an alien, now in England, conveyed to the plaintiff since the decease of their father. This action is brought against said Herbert Burrows and his wife Ann, for the purpose of compelling the execution and delivery of a deed from them to the plaintiff. The following causes of demurrer were assigned in each demurrer, viz: that it appeared upon the face of the complaint—1st. That the court has no jurisdiction of the person of the defendant or of the subject of the action. 2d. That the plaintiff has not legal capacity to sue. 3d. That there is a defect of parties plaintiff and a defect of parties defendant. 4th. That the complaint does not state facts sufficient to constitute a cause of action.

Gale, Coit & Harris, for the appellant.

Selden, Munger & Thompson, for the respondents.

E. DARWIN SMITH, J. The agreement set out in the complaint in this action, although it has in it some peculiar and special provisions, is in legal effect an ordinary contract for the conveyance of land on the payment of the purchase money. In such cases the estate vests, in equity, in the vendee, and the vendor retains the legal title as a mere lien for his security for the unpaid purchase money. The interest of the vendee in the contract is real estate, and goes to the heirs and not to the executors, (*Champion v. Brown*, 6 *John. Ch.* 398; *Griffith v. Beecher*, 10 *Barb.* 434; 18 *id.* 83;) and the same may be sold on application of the executors or administrators of the vendee, in the same manner as if he had been seised of such land. (3 *R. S.* 5th ed. 199, § 78.) And the widow is also entitled to dower therein. (*Id.* §§ 84, 85.)

Upon the decease of the vendor in such a contract his interest in the contract is personal property, like a bond and mortgage, and goes to his personal representatives, and the contract should be embraced in the inventory of his estate by his executors or administrators, as a security for the payment of money under section 12 of art. 1st, title 3d, chap. 8th of the 2d part of the revised statutes, (*vol. 3, 5th ed. 170.*) It follows that this interest of the original vendor in a contract of this kind will pass by assignment, like a bond and mortgage, with or without seal, and also that it may be sold as personal property by his executor or administrator. (*Bogert v. Hertell, 4 Hill, 506.*) The sale of the contract, therefore, by the administrator, as stated in the complaint, gave a good title to John Thompson to receive the moneys remaining due on the same at the decease of William and Sarah Burrows. The assignment, too, by Josiah W. Burrows of his interest in the contract, as stated in the complaint, conveyed to the plaintiff all his interest therein, and entitled the plaintiff to pay up said contract and receive a conveyance of the land from the heirs of William Burrows. Such heirs took the title by descent as a mere security in equity for the payment of the debt, precisely as they would have taken it by deed, to hold in trust as security for a debt due to a third person. The debt was due in this case to the executor, and the lien was held by the heirs in trust and simply as a pledge or security for its payment. On payment of the debt, the heirs are compellable in equity to execute the trust by a conveyance of such title. (*2 R. S. 194.*) In this view of the rights of the parties, the defendants are not entitled to raise any of the questions presented on the argument relating to the sale or assignment of the contract and the payment of the amount due thereon on a waiver of such amount, except so far as to see that the plaintiff is entitled to a deed of the premises on the basis of a full performance of the contract on the part of Josiah W. Burrows or the plaintiff as his assignee. The heirs of William Burrows cannot be called on to convey till

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the debt is paid. They have no interest in the question when or how it is paid, so long as the contract remains in force. All the questions raised on these demurrers, I think, were rightly disposed of, so far as they were passed upon by the court. But there is a point taken here, which I presume was not taken at special term, that it is not alleged that William Burrows died seised of the property in question, or that the title to said premises is vested in the defendants by descent or otherwise. This I was inclined to think a fatal defect in the complaint, but my brethren think otherwise, and that the complaint states all that the plaintiff will be bound to prove on the trial; and that is sufficient under the code. The order of the special term should therefore be affirmed.

KNOX, J. concurred.

JOHNSON, J. dissented.

Order affirmed.

[MONROE GENERAL TERM, March 4, 1861. *Smith, Johnson and Knox*, Justices.]

 ADAMS and others vs. GREEN and others.

As between the executor and the heir or devisee of a vendor, a contract for the sale of land is personal estate, and goes to the executor, and not to the heir or devisee.

Hence, in an action by the devisees of the vendor, against the vendee, to recover the balance of purchase money due upon the contract, the executor of the vendor should be joined as plaintiff. JOHNSON, J. dissented.

APPEAL by the defendants from an order made at a special term, overruling a demurrer to the amended complaint. On the 5th of November, 1847, Abner Adams and the defendant Green made and executed the agreement set forth in the complaint, whereby Adams covenanted to convey the

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1 66
2 400
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44a 616
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65h 412

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premises therein described to Green, his heirs and assigns, on payment of \$1050 and interest, in ten installments, the last of which became due on the 1st day of January, 1857. All the payments were to be made "previous to the party of the first part executing a deed to the party of the second part." Green entered into possession, and afterwards transferred his interest in the contract to the defendant Wadhams, who leased the premises to the defendant Smith. In January, 1848, the vendor died, leaving a will, by which he devised to his two sons, the plaintiffs, the land and the contract. Green and his assigns made default in their payments, and the contract has been violated for years on their part. By the will Myron Adams, one of the plaintiffs, was appointed executor, and this action was originally commenced by him, praying for a foreclosure of the contract, a sale of the premises to pay the amount due, and judgment for the deficiency against Green. To this original complaint the defendants demurred, and alleged as the grounds thereof, 1st. That it did not appear the plaintiff had any interest in the subject matter of the action. 2d. It appeared that other parties should be plaintiffs. 3d. That the facts and circumstances alleged in the complaint, were not sufficient in law to maintain the action. The demurrer was sustained by Judge Johnson, at special term, on two grounds, as appears by his written opinion: 1st. Because the fee of the land was in the devisees of the vendor, subject to the contract, and was not assets in the hands of the executor, by our statute. 2d. Because, in any view, the heirs or devisees of the vendor held the land in trust for the purchaser, or his assigns, and should as such be parties to the action. Upon that decision the complaint was amended, and put in its present form. In the amended complaint, the plaintiffs sued as *devisees*, and Myron Adams was not joined in his character of *executor* of the vendor. The complaint set forth the above facts, and alleged that the defendant Green had not complied with the

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conditions of said contract, but had made default in the payment of the sums therein agreed to be paid, nor had any person paid said sums; and that there is now actually due and unpaid the sum of \$200, and interest thereon from the 9th day of March, 1857, and which the plaintiffs, before the commencement of this action, had repeatedly demanded of each and all of the defendants. The plaintiffs therefore prayed that the defendants might discover whether there is or are any, and what liens or incumbrance upon, or affecting their or either of their interests in or to said contract, or the premises therein described, subsequent to the date of said contract; and if so, in whom the same is vested, and that an account might be taken by and under the direction of the court of what is due and owing to the plaintiffs for principal and interest on said contract; and that the said defendants Green and Wadhams might be adjudged to pay to the plaintiffs what should be found to be due on taking the said account, together with the costs of this action, or in default thereof, that the defendants and all persons claiming under them, or either of them, might be absolutely debarred and foreclosed of and from all right and equity of redemption in or to said premises, and every part thereof, and that they might deliver up to the plaintiffs the said contract and all other papers in their custody or power relating to or concerning said premises, or any part thereof, and that the plaintiffs might have further or other relief, &c. To this complaint the defendants demurred and alleged, 1st. That the plaintiffs have no interest in the contract. 2d. That other parties should be plaintiffs. 3d. No performance on the part of the vendor is shown. 4th. No tender of a deed is shown. 5th. The facts and circumstances are not sufficient to maintain the action.

G. H. Mumford, for the appellant.

D. C. Hyde, for the respondents.

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E. DARWIN SMITH, J. In the case of *Moore v. Burrows*(a) we were prepared at the last December term to decide that as between the executor and heir of a vendor, a contract for the sale of lands was personal estate, and went to the executor and not to the heir. Before the decision was announced this case came on for argument, and as my brother Johnson was not satisfied with the proposed decision of that case we allowed the argument in this to proceed as though the question were an open one, and retained that case, with this, under advisement for further consideration. In looking into the case anew and reviewing the authorities, I am unable to come to any other conclusion upon the question than that which is expressed in the opinion in that case. The legislature of this state have impliedly if not expressly asserted the rule to be as stated in *Moore v. Burrows*, in section 99, art. 7, chap. 1st of part 3d of the revised statutes, (3 R. S. 275, 5th ed.) which is as follows: "The supreme court or a county court shall have power to decree and compel a specific performance by any infant heir or other person of any bargain, contract or agreement, made by any party who may die before the performance thereof, on petition of the executors or administrators of the estate of the deceased, or of any person or persons interested in such bargain, contract or agreement, and on hearing all parties concerned and being satisfied that the specific performance of such bargain, contract or agreement ought to be decreed or compelled." This provision impliedly assumes that the purchase money is *personal estate*, and goes to the executor or administrator. It is in effect a provision whereby they may, upon the payment to them of the purchase money, execute the contract of the vendor by procuring a conveyance from his heirs to the vendee. The question was expressly decided in the case of *Farrier v. The Earl of Winterton*, by Lord Langdale, master of the rolls, reported in 6 *Jurist of* 1842, p. 204. The question was whether the devisee of the land contracted to be sold by

(a) Ante, page 173.

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the testatrix in her lifetime, or the personal representatives, were entitled to the purchase money remaining unpaid on a contract for the sale of the land. It was held that the devisee had no interest in the purchase money, but that the money in question belonged to the personal representatives. (See also 2 *Story's Eq.* § 790; *Hill v. Ressegieu*, 17 *Barb.* 166; *Lewis v. Smith*, 5 *Selden*, 502; *Roberts v. Merchants*, 1 *Hare*, 547; *S. C.* 23 *Eng. Ch.* 547.) In the last mentioned case the administrator of a vendor who had died intestate filed his bill against the purchaser, for a specific performance of a contract for the sale of land. It was objected that the heir was a necessary party to the suit. It was held that the objection was a valid one, and that the purchaser in such a case, when sued for a specific performance of his contract, is entitled to have the question of the validity of the contract decided in the presence of the vendor, or if the vendor be dead, in the presence of the party who represents him. In this case the action is brought without making the executor a party. *Calvert, on Parties in Equity*, (p. 293,) says that "when a vendor dies after having entered into an agreement to sell, and makes a devise of all his real estate, both the real and personal representatives are necessary parties, the former that they may convey the property contracted for, and the latter that they may give a discharge for the purchase money." It follows from these authorities that the demurrer in this case is well taken, on the ground that the executor is a necessary party to the suit. Judgment should therefore be given for the defendant, on the demurrer, with leave to the plaintiff to amend by adding the proper parties, on payment of costs.

KNOX, J. concurred.

JOHNSON, J. (dissenting.) The demurrer to the complaint necessarily raises the question whether a contract for the sale

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of land, in the case of the death of the vendor before performance by the purchaser, goes to his heir, executor or administrator, as assets under the statute. When this case was before me at special term, on a former occasion, I intimated, without much examination of the question, an opinion that under the terms and evident policy of our statute, the executor did not take the contract as assets and had nothing to do with it, or its enforcement. The question then raised by the demurrer, was whether the executor could maintain an action to foreclose the contract, or enforce its performance specifically alone, without joining, as plaintiff, the devisee of the land. I then held that he could not; that the devisee of the land was a necessary party, and suggested whether the executor, as such, had any interest which would warrant his joinder as plaintiff, even with the devisee.

The case now comes before us, on a demurrer to an amended complaint, substituting the devisee as the party plaintiff, in the place of the executor, and amending in some respects the prayer of the complaint. The question whether an executor or administrator takes as assets, contracts for the sale and purchase of land, depends entirely upon the provisions of the statute. It will be seen that the statute (2 R. S. 82, § 6) has with great care and particularity specified what property shall be deemed assets, and shall go to the executors or administrators, to be applied and distributed as part of the personal estate of the testator or intestate, and included in the inventory thereof. It is quite obvious, as it seems to me, upon a careful examination of this list, that neither land contracts nor the interests of either party in the land which is the subject of such a contract, is given to the executor or administrator as assets, or was intended to be made such, to be applied and distributed as part of the personal estate. In looking into the scheme and policy of the statute, a good and sufficient reason for this omission will at once become apparent. The interests of both vendor and vendee, under the

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contract, in respect to the land, is deemed real estate, and provision is made for selling it as real estate, by the executors or administrators, in case of a deficiency of the assets enumerated and included in the inventory, for the payment of debts. The real estate is thus made in one sense assets contingently, although it does not go into the inventory, and is not deemed personalty. (*Story's Eq.* § 551.) The conditions upon which an application for the sale of the real estate by the executors or administrators may be made, are all carefully prescribed in title 4 of chap. 6; and where the sale is regularly made and confirmed, a conveyance is directed by the surrogate to be made by the executors or administrators to the purchaser. This conveyance, when made, it is declared by section 31, "shall be deemed to convey all the estate, right and interest in the premises of the testator or intestate at the time of his death." By section 66 the interest of the purchaser, in such a contract, is to be sold and conveyed in the same manner as though he had died seised of the land. And by section 67 the interest of the assignee of the purchaser may be sold in like manner. The surplus, after payment of debts and expenses, goes to the heirs or devisees of the testator or intestate, in proportion to their respective rights and interests. (§§ 43, 71.)

This precise question has been decided by this court, upon reasons which to my mind are entirely satisfactory and conclusive. (*Griffith v. Beecher*, 10 Barb. 432.) This decision at a general term of this court is binding upon us as authority, unless it is so clearly erroneous that we should feel bound to reverse it, had it been made by ourselves at general term. It is true that was the case of a deceased purchaser, who had nothing but an equitable title; but the point involved and decided was, that the statute did not give such a contract to the executors or administrators, nor make it assets.

There can be no doubt, I suppose, that one who is seised of real estate, and enters into an executory contract to sell it,

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remains seised until the contract is executed and the land conveyed by him. After the contract it may be sold or mortgaged by such owner, the same as before, and a judgment attaches as a lien upon it, and subjects it to sale and conveyance by the sheriff. There is this difference, however, that in every such case the purchaser or mortgagee takes subject to the equitable rights of the purchaser under the contract; especially if the latter is in possession, so that others are bound to take notice of his rights. (*Moyer v. Hinman*, 3 Kern. 180. *Parks v. Jackson*, 11 Wend. 442.)

The rights of a purchaser, under such a contract, are entirely different. He has no legal title, and technically is not seised of any legal estate. A judgment against him is no lien upon his interest, as it is upon the right and title of the vendee, by the express provision of the statute. (1 R. S. 744, § 4.) The statute (2 R. S. 57, § 2) provides that every estate and interest in real property descendible to heirs may be devised. The heirs of every person who may die without devising his *real estate* take it by descent, and this term real estate, as used in our statute regulating descents, is deemed to include "every estate, interest and right, legal and equitable, in lands, tenements and hereditaments," with certain exceptions, not material to the consideration of the question before us. (1 R. S. 751, § 1. *Id.* 755, § 27.) It is thus seen that the statute, in the most positive and explicit terms, gives the entire estate and interest, whether legal or equitable, which the testator or intestate had in the land, to his heir or devisee, as land or real estate, who takes an estate or interest of the same character and quality that such testator or intestate had at his decease. As real estate the statute prescribes how, and under what circumstances, the executor or administrator may sell it, and he has no right to interfere with it in any other way. The equitable rule which treats the interest of the vendor as personalty, and that of the purchaser as real estate, has nothing whatever to do with the

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question. The fiction of equity (for it is nothing more) that an agreement to sell converted the real into personal estate, in the hands of the vendor, never obtained at law. At law it is regarded as it is in fact, a new agreement to sell, by which the purchaser obtains only a right to enforce the contract, upon performance or offer to perform on his part. It is a mere contract right. The statute controls, and the rules therein prescribed are to govern, and afford the only grounds of a solution of the question for the courts.

In England, and doubtless in other countries where estates are administered by the court of chancery, or where chancery has concurrent jurisdiction with other courts, in their administration, property and things in action which equity regards as of a personal nature, go to the executors and not to the heir. And hence it is that in England, upon the vendor's death the unpaid purchase money forms part of his personal estate, and goes to the executors. (*Dart on Vendors and Purchasers*, 121.) Not so here, however, where the statute gives the interest of the vendor to the heir as real and not as personal estate. The heir thus taking the title holds it as did his ancestors, as a species of trust, for the purchaser. This at best, however, is a mere formal trust, for the purpose of affording the requisite remedy upon the contract, until the whole purchase price has been paid or offered to be paid, according to its terms. Then, and then only, does equity really regard the vendor as holding in trust, for the use of the purchaser. (*Bogert v. Perry*, 17 *John.* 351. *S. C.*, 1 *John. Ch. R.* 52.)

Indeed, looking at the complaint, the material allegations of which are all admitted by the demurrers, it does not appear that the defendants will ever be able to enforce a specific performance of the contract in this case. The purchaser had not even the right of possession, by the express terms of the agreement, and there would seem to be nothing in the way of the plaintiff's maintaining ejectment, to recover pos-

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session of the premises, or trover to recover the value of timber which may have been severed by the defendant from the premises and converted, under the well settled rules of law. (*Suffern v. Townsend*, 9 *John.* 35. *Cooper v. Stower*, *Id.* 331. *Mooers v. Wait*, 3 *Wend.* 104.) But I do not insist upon any such considerations. I prefer to rest my opinion exclusively upon the provisions of the statute and the decision in *Griffith v. Beecher*, (*supra.*) The statute, by giving the interest in the land belonging to each deceased party to the contract, to his heir or devisee, and the right, only, to the executors or administrators of selling that interest, under certain circumstances, and for particular objects, has, most aptly and judiciously, avoided the innumerable difficulties which would inevitably surround the usual remedies upon the contract, in the hands of the executors or administrators of the vendees, with the formal title in the hands of the heir or devisee. He could not rescind in case of a refusal to perform on the other side, because such rescission would necessarily operate to benefit the heir, to the prejudice of the personal representative. He could not maintain an action at law, to recover the payments, because, having no title to the land, he could not allege a readiness or an offer to convey. And he would encounter the same difficulty, in an action to compel a specific performance, on the part of the purchaser. Nor could he maintain ejectment, having no right of possession. The statute leaves the heir or devisee, on the other hand, to pursue his remedy against the other party, through the courts of equity or by actions at law, the same as the testator or intestate might if living. The executor or administrator, by the statute has nothing to do with the contract, except in the single case of a sale by him of the interest of the purchaser. In that case he assigns the contract to the purchaser, by the order of the surrogate. (2 *R. S.* 111, § 69.) This is only a statutory mode of transferring the interests of the decedent to the purchaser at the sale.

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It is scarcely necessary to remark, in this connection; upon the main argument, that when the statute gives to the heir or devisee of the vendor the entire interest as land, there can be nothing left as personalty in the contract, for the executor to take. The statute also by this disposition necessarily prevents the interest from becoming mere personalty, to go to the executors or administrators according to the rule in equity, and continues it as real estate in the hands of the heir or devisee.

These considerations, independent of the decision before referred to, have led my mind irresistibly to the conclusion that the executor in this case has no right or interest whatever in the contract, or in the land, and ought not to be a party to the action, but that the devisee stands in the place of the testator and can maintain any action that the latter could, had he been living. The decision made at special term should therefore be affirmed.

Judgment for the defendant.

[MONROE GENERAL TERM, March 4, 1861. *Smith, Johnson and Knox*. Justices.]

HAIGHT vs. CHILD and RILEY.

Where, in an action for the specific performance of a contract for the sale of lands, the answer of the defendant sets up a contract essentially different from that stated in the complaint, the latter, if by parol, cannot be specifically enforced.

The code has altered the rule of pleading in such cases. Now, if the defendant admits the making of a contract, and sets out its terms, his answer will be sufficient, although it omits to set up the statute of frauds as a bar.

A party, in pleading, now, need only state the facts he is required to prove, and need not insist on his legal rights under any statute, or draw legal conclusions.

Part payment is not such a part performance as will entitle a vendee of lands to a specific performance.

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Taking possession, by the vendee, is not a basis for a specific performance, if the possession has been surrendered by him, and received by the vendor, before the commencement of the action.

A vendor cannot have a decree for a specific performance, where he does not aver and show a readiness and willingness to perform the agreement on his part, but the vendee alleges and proves that he was ready and willing, and offered, to perform the same, and that he demanded a deed, before the commencement of the suit, which was refused.

THIS was an appeal by the defendant Riley from a judgment entered upon the report of a referee. The action was brought to compel the specific performance of a parol contract for the sale to the defendants of a flouring mill, situate in the city of Rochester. The complaint states that shortly prior to the first day of September, 1858, the plaintiff, by her agent, Eben N. Buell, entered into an agreement with the defendant Jonathan H. Child, to sell and convey by a good and sufficient deed, to him, the real estate described in the complaint, "and that the said Jonathan H. Child, by said agreement, agreed that in consideration of receiving from the said plaintiff such good and sufficient deed, conveying to him such real estate, he would pay therefor the sum of \$10,000, in manner following; assuming and undertaking to pay the following liens and incumbrances upon said property, viz: all taxes which had been or should be assessed on the said real estate, during the years 1857 and 1858; an assessment then due for repairs on the mill-race on which such mill was situated, amounting to about \$185, and which was a charge upon the said real estate; a mortgage on said real estate given by James Chappell to the Rochester Savings Bank, then past due, the amount whereof was \$3000, with interest thereon from July 1st, 1858; a mortgage of said premises, given by Eben N. Buell to James Chappell, and then held by David Dows, on which there remained unpaid on the 1st of September, 1858, the sum of \$1750; a mortgage on said real estate, executed by Jonathan Child to Henry Haight, and by him assigned to Eben N. Buell, for the

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benefit of said plaintiff, and which would become due March 15th, 1859, and on which there would then be due the sum of \$2500, and interest thereon from September 1st, 1858; \$250, with interest, six months after the 1st day of September, 1858; \$250, with interest, twelve months after the 1st day of September, 1858; and the remainder of the said \$10,000 in cash." The complaint further states "that shortly thereafter, but at precisely what time is to the plaintiff unknown, the defendant George S. Riley became in some manner interested with the defendant Child in the purchase of the aforesaid real estate, and entitled to the benefit of said agreement; that on or about the 1st day of September, 1858, the defendant Child paid the sum of \$1882.25, that being the balance of the aforesaid consideration of \$10,000, which was to be paid in cash, as hereinbefore mentioned."

The contract, as proved on the trial, was a contract made between the plaintiff, through her agent, with the defendants, jointly, and not with Child alone, and was as follows: That the plaintiff was to convey to the defendants the real estate described in the complaint, subject to the payment of the incumbrances stated in the complaint, and upon the payment of the \$1882.25 in cash, except that instead of assuming the mortgage for \$2500 from Jonathan Child to Henry Haight, that mortgage was to be canceled, and a new mortgage taken from the defendants directly to the plaintiff, for \$2500, payable one-half on the 1st day of September, 1860, and the other half on the 1st day of September, 1861, with semi-annual interest. It was further proved that by a separate agreement between Child and Buell, and of which Riley had no knowledge—and with which, it was agreed between Buell and Child, Riley should not be made acquainted—Child was to give Buell his two notes of \$250 each, payable one in six months, and the other in twelve months, from the 1st September, 1858, with interest. But it was expressly understood that these notes should not form any part of the

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consideration of the sale to Riley and Child jointly. The notes were to be given to Buell for a claim of \$500, which he claimed to have in his own right, and in some way connected with the property, but which constituted no incumbrance upon it. Immediately after the agreement was completed, a deed was prepared by Buell, and signed by him, as trustee for the plaintiff, to both defendants, in which the consideration expressed was \$9000, and containing covenants for the payment of the incumbrances, except the mortgage of \$2500 to Henry Haight, assigned to Buell, and a mortgage was also prepared for Riley and Child, for this \$2500, payable as before stated. The deed was objected to, on the ground that Buell could not convey, as trustee of Mrs. Haight, the title being in her, and not in Buell as trustee. This was assented to by Buell, and he prepared and sent to Mrs. Haight, in California, a deed to be signed by her and by Buell, as trustee, which was a copy of the first deed, with the addition of Mrs. Haight, as grantor. This deed was returned to Buell in January or February, 1859, but was never tendered to the defendants, or either of them. But in March, 1859, Riley applied to Buell for the deed, and offered to pay what was then due for the purchase money, and complete the purchase. Buell refused to deliver the deed, unless Riley would indorse or secure the payment of the two notes, given by Child to him. The testimony fully established the readiness of Riley to perform, and the refusal of Buell to convey, unless the \$500 were paid, or secured.

The referee found that the contract was substantially as above stated, and not as stated in the complaint, and that Riley offered to perform the contract as here stated, and that the plaintiff's agent refused, as is also stated. The defendant Riley insisted that the plaintiff was not entitled to any decree against him, but that on the contrary he, Riley, was entitled to a judgment against the plaintiff for the money paid by him on account of the contract, on the ground that the plaintiff had refused to perform the contract on her part.

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The referee directed a judgment for the plaintiff, with special provisions.

S. Mathews, for the appellant.

Wm. F. Cogswell, for the respondent.

By the Court, E. DARWIN SMITH, J. The plaintiff seeks in this action a specific performance of a contract for the sale of lands. The contract set out in the complaint is an agreement for the sale of the real estate in question for the price of \$10,000, payable by the assumption on the part of the defendants of certain incumbrances thereon to the amount of \$9500, and of \$500 in two notes of the defendant Childs, at six and twelve months. The defendant Riley, in his answer, admits the contract as stated in the complaint, except that the contract price was to be \$9500, and denies all knowledge of, or assent to, any agreement to pay the \$500 for which the notes of Child were so given, and states that the contract was by *parol*. The defendant Riley has paid \$1882.25 towards the purchase money, and the defendants went into possession, which however had been restored to the plaintiff before the commencement of this suit. As the contract stated in the answer is essentially different from that set up in the complaint, the contract set up in the complaint being by *parol*, clearly cannot be specifically enforced. (*Fonblanque's Eq. book* 1, *chap.* 3, *sec.* 8, *note d.* *Harris v. Knickerbacker*, 5 *Wend.* 638. *Willard's Eq.* 282.) In such a case it was not admissible, under the former system of pleading, where there was dispute about the terms of the contract, to establish the same by *parol*, for that is the very mischief the statute was designed to prevent; and a contract by *parol* was only enforced when not denied in the answer, upon the principle that, being admitted, no proof of it was requisite, and the statute was thereby waived. (*Story*, § 755.) If the de-

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defendant Riley had simply denied the contract set up in the complaint, the plaintiff would have been obliged to prove a written contract valid in law; or, if admitting the contract he had alleged that it was by parol and insisted on the statute, then there could have been no specific performance, and the complaint in such case must have been dismissed. (2 *Paige* 177. 5 *Wend.* 638.) But as the defendant admits the making of a contract and sets out its terms, and does not insist on the statute in his answer, the contract thus set out in the defendant's answer might perhaps be specifically enforced, (if the code has not altered the rule of pleading in such cases;) and if need be, the complaint might be amended to conform to the contract thus admitted. The defendant's contract is thus reduced to writing in his sworn answer. (*Story's Eq.* §§ 754, 755.) But I think the code does alter the rule of pleading, in such cases, and that the answer is sufficient in this case without setting up the statute. A party in pleading now need only state the facts he is required to prove, and need not insist on his legal rights under any statute, or draw legal conclusions. But the defendant Riley has made, for the purpose of this suit, no contract for the purchase of the land in question, binding upon him in any event, except the one thus stated in his answer, as there is no basis for the enforcement of the contract on the ground of a *part* performance. Part payment is not such part performance as will entitle a vendee of lands to a specific performance. (*Story's Eq.* §§ 760, 761. *Sug. on Vend.* § 3, *ch.* 3, *p.* 112, 7th ed.) And such part performance would not be available in favor of the vendor, for much stronger reasons. The possession taken by the defendant in this case is not a basis for a specific performance, because it had been surrendered by the defendant and received by the plaintiff before the commencement of this action. But assuming that the defendant, by not pleading it, has waived the statute, and that the contract set out in the answer of the defendant Riley is the true contract between the parties, can

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the plaintiff have a decree requiring the defendant to perform such contract specifically? Very clearly I think she cannot, upon the allegations and proofs in this action. The plaintiff does not aver and show that she is ready and willing to perform this agreement, and on the contrary the defendant Riley alleges and proved that he was ready and willing and offered to perform the same, and that he demanded the deed before the commencement of this suit, and the plaintiff by her agent refused to perform. Upon this issue, therefore, there is no ground for a recovery in this action, and the referee should have dismissed the complaint so far as relates to the case upon the main issue on the part of the plaintiff. Whether the defendant was entitled to recover the \$1882.25 is another question arising upon the defendant's counter-claim, which will remain for consideration on a retrial of the cause; and as there must be a new trial, I think it had better be left unconsidered by the court and undecided. The judgment should be reversed, and a new trial granted, with costs to abide the event.

[MONROE GENERAL TERM, March 4, 1861. *Smith, Johnson and Knox*, Justices.]

PICKETT *vs.* KING.

The rule in respect to partial payments remains the same as it was before the code, viz. that in order to take a case out of the statute of limitations they must be made under circumstances to warrant a finding, as a question of fact, that the debtor intended to recognize as subsisting the debt in question, and that he was willing to pay it.

A debtor, upon assigning his property in trust for the benefit of creditors, parts with all control of the property assigned, and appoints the assignees his trustees to apply the proceeds thereof as directed in the assignment; but they do not become his *agents* in such a sense as to have authority to make any new contract or promise binding upon him, or to make a *payment* upon any of his debts which shall be equivalent to a new and express promise by him.

An assignee is not an *agent* authorized to renew a debt, or take it out of the statute of limitations, as against the assignor.

The case of *Barger v. Durvin* (22 Barb. 68) disapproved.

APPEAL by the plaintiff from a judgment entered upon the report of a referee. The action was brought against the defendant as survivor of himself and Hosea King, deceased, upon a note given by them as copartners, and payable one day after date, dated October 9th, 1852. The action was commenced October 16th, 1858. On the 13th day of October, 1858, six years had elapsed from the time the cause of action accrued. On the 11th day of October, 1852, the maker of the note made a general assignment of his property in trust for creditors to Cullen Foster and J. T. Mackenzie. This assignment, after providing for the payment of expenses, in the first class, provides for the appropriation of the fund to the second class, (among other things,) as follows: "To the payment of all debts now due or now contracted and hereafter to become due against us, the said Hosea King and Darius W. King, as such partners, to any person or persons whomsoever, for money actually borrowed, including a debt due the firm of J. & A. Merrick for flour, and all payments upon the last mentioned debts to be made *pro rata*." The note in suit was given by the defendants for money borrowed by them, and the debt was claimed by the plaintiff to be within the terms of the assignment. On the 11th July, 1853, the as-

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signees paid on this note \$77.02 out of the trust fund, and that payment was relied on by the plaintiff to take the case out of the statute of limitations. The defendant, among other defenses, set up the statute of limitations as a bar. The action was referred to a referee, who found the above facts, and arrived at the conclusion of law that the statute of limitations was a bar; and that the payment made by the assignees did not take the case out of the operation of the statute. He therefore ordered judgment for the defendant, for costs.

D. H. Devoe, for the appellant.

William Clark, for the respondent.

By the Court, E. DARWIN SMITH, J. The numerous and multifarious decisions in this country and in England upon the statute of limitations demonstrates the folly of departing from the original simplicity of the statute, to favor cases of supposed or real hardship. The original statute of James 1st, chap. 165, which has been adopted in all the American states, provides in explicit language, (§ 3,) that "all actions of trespass, detinue, of account, and upon the case, and all actions of debt or contract without specialty, &c., shall be commenced and sued within six years next after the cause of such actions or suits, and not after." Instead of treating this statute as a conclusive bar and allowing the original debt to constitute an adequate consideration for a new contract or express promise, the courts in England and in this country till quite recently have regarded the statute as merely raising a *presumption of payment*, which might be repelled by an acknowledgment of the existence of the debt or any slight admission that it remained unpaid. Before the code the cases had got back so far towards the original meaning and intent of the statute, as to hold that there must be an *express promise* or a clear recognition of the present existence

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of the demand from which a promise might be implied. (*Stafford v. Richardson*, 15 *Wend.* 302. *Sands v. Gelston*, 15 *John.* 511.) It is upon this principle that partial payments have been held to revive the debt. They have been held to constitute both an admission of the debt and also to imply a willingness to pay the same. Repugnant as this class of cases is to sound principle and to the obvious meaning and intent of the statute that the same should be an absolute bar not to be overreached except by a new and express contract, still the rule has so long prevailed in respect to partial payments that it would be unwise to disturb it, if the legislature had not expressly affirmed or sanctioned it in section 170 of the code, in the re-enactment of the statute of limitations, in which section, while an express promise in writing signed by the party to be charged therewith is required, to take a case out of the operation of the statute, it is expressly provided that the said section "shall not alter the effect of any payment of principal and interest." In respect to partial payments, therefore, the law remains as before the code. The rule in respect to such payments is that they must be made under circumstances to warrant a finding, as a question of fact, that the debtor intended to recognize as subsisting the debt in question and which he was willing to pay. (*Shoemaker v. Benedict*, 1 *Kern.* 185.) If the assignment in this case had provided in express terms for the payment of the note upon which this action is brought, no doubt such provision would have taken the debt out of the statute, and the provision which is made for its payment in a particular class of creditors, I think, for that purpose, must be equally operative. The provision in the assignment in favor of all debts for borrowed money included the plaintiff's debt, and was an admission of its existence, and implied also a willingness to make payment thereof. But such recognition of the debt, and willingness to pay it, I think, must be confined to the *point of time* when the assignment was made. At that point of time the defendant must be held to recognize the existence

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and validity of the debt and to express a willingness to pay it. Provision for its payment must be equivalent to an express promise then made to pay such debt, and any payment thereafter made with funds set apart and provided to pay such debt should be deemed made as of that date, and to relate to that period of time, whenever made. Upon making such assignment the defendant parted with all control of the property assigned, and appointed his assignees his trustees to apply the proceeds thereof as directed in said assignment; but I cannot think they became his *agents* in such a sense as to have authority to make any new contract or promise binding upon him, or to make a payment upon any of his debts which should be equivalent to a new and express promise by him; and such must be the consequence if partial payments made by them are to have the same effect as if they were made by the debtor himself. In this particular I cannot agree with the case of *Barger v. Durvin and others*, (22 Barb. 68.) That case is precisely in point upon the question, but it is a special term decision, and I cannot regard it as authoritative. That case is put upon the ground that the payment by the assignee shall be regarded as a payment by an agent, under the authority and direction of the debtor, and in that sense to be equivalent to a payment by the debtor himself. The case of *Jackson v. Fairbanks* (2 H. Black. 340) would sustain such views of the statute. In that case a dividend paid under a commission of bankruptcy was held such an acknowledgment as to revive the debt. But this is questioned, and virtually repudiated, in *Blanchard v. Wharton*, (1 Barn. & Ald. 220,) and in 15 Vesey, 499, in *Roscoe v. Hale*, (7 Gray, 274,) *Llodare v. Doane*, (*Id.* 378,) and in *Roosevelt v. Mack*, (6 John. Ch. 266, 292,) where Chancellor Kent says: "It is going unreasonably far to construe payments by assignees or trustees who are not parties to the contract, or under any personal obligation to pay or contribute, as meaning more than they plainly import, or as carrying with them sufficient evidence of a renewed personal promise of the

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original debtor to pay.” He says also, and I think his reasoning applies to cases of voluntary assignments or other trusts as much as to assignments under the insolvent or bankrupt law, “such special trusts were not created for any such purpose, and it is perverting the intention of the parties and is plainly repugnant to the reason and equity of the trust, to make the ordinary execution of the trust the ground of a constructive new assumption of the debt by the debtor.” This language seems to me to apply to this case in all its force, and to be an express repudiation of the doctrine that an assignee is an agent authorized to renew a debt or take it out of the statute of limitations, as against the assignor. The assignee is not an agent for any such purpose. He is authorized and appointed to apply the money in his hands in a specified way, and has no other power or authority in behalf of his assignor; and he has no power to express for his assignor a subsisting or continuing *willingness* to pay any further sum to the creditor, on account of the debt, than is expressly provided for that purpose. In *Shoemaker v. Benedict*, (1 Kernan, 184,) it is said the acknowledgment or promise must be made by the *party* to be charged, or by some person authorized by him. The only promise made by the defendant was made in and by his assignment, and no person is therein authorized to make any new promise for him. It would be highly unjust to allow an assignee, under such construction, to continue and revive a debt of his assignor indefinitely and against his will, and without his knowledge. The cases of *Van Keuren v. Parmelee*, (2 Comst. 253,) and *Shoemaker v. Benedict*, (*supra*,) repudiate, and I think wisely, this class of constructive agencies by which debts were wont to be revived without the knowledge or consent of the debtor. In principle I think this case is within the spirit of those decisions. The referee, I think, rightly decided the case, and the judgment should be affirmed.

[MONROE GENERAL TERM, March 4, 1861. *Smith, Johnson and Knox*, Justices.]

SLAUSON and others vs. ENGLEHART.

The legislature, in authorizing supplemental answers, by the 177th section of the code, intended to follow the former chancery rule, by which a defendant in that court was not allowed, in his supplemental answer, to contradict the statements in his first answer.

Thus, where, in an action upon a promissory note, the defendant, by his answer, put in issue the making of the note and its delivery by him, as well as its transfer to the plaintiff, and then put in a supplemental answer, setting up as a defense a former suit for the same cause of action and a verdict and judgment in favor of the defendant; *Held* that the judge at the circuit decided correctly in compelling the plaintiff to open the case to the jury, and produce his evidence in support of the action, in the first instance, notwithstanding the matters set up in the supplemental answer.

A former suit, brought by the holder of a promissory note, against the maker, for the consideration for which the note was given, and a verdict and judgment for the defendant therein, is no bar to an action upon the note, by the holder against the maker.

Where the second action involves no inquiry into the merits of the former judgment, and is sustainable on grounds entirely independent of such former judgment, it will not be barred.

THIS action was commenced to recover the amount of a promissory note alleged to have been made by the defendant, payable to the order of one William Goodwin, and by him indorsed to the plaintiffs. Issue was joined by the answer of the defendant, who by it denied all the allegations in the complaint. In October, 1856, upon this issue, the cause was tried and resulted in a verdict for the plaintiffs, which was sustained at special term, but afterwards, in December, 1857, was set aside by the general term, and the cause again noticed for trial at the Monroe circuit, in April 1859, at which time the court gave the defendant leave to serve a supplemental answer, which was done on the 15th day of April, 1859. This answer alleged that after the commencement of this action, the plaintiff commenced another action against the defendant for the same claim, demand and cause of action as that alleged in this action. That issue was joined therein upon the merits, and the same tried in October, 1857, before a jury, who rendered a

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verdict for the defendant therein, upon which judgment was entered, and that said verdict and judgment are a bar to this action. Upon the trial of the present action at the circuit, in January, 1860, the plaintiffs insisted that the supplemental answer waived the original answer; that the only issue to be tried was that made by the supplemental answer, and that upon that issue the defendant held the affirmative. But the court decided that the supplemental answer did not waive the former, and that the plaintiffs held the affirmative of the issues, and should open the case; to which decision the plaintiffs excepted. The plaintiffs then proved the execution of the note by the defendant, and its transfer before maturity by the payee, to the plaintiffs, in payment for goods purchased by him of them. The defendant's counsel, upon cross-examination, asked the witness: *What was the consideration of that note?* To this question the plaintiffs' counsel objected, on the ground that the plaintiffs were holders for value, and the defendant could not show the consideration. But the objection was overruled by the court, and the plaintiffs excepted. The defendant, to prove the issue upon the supplemental answer, offered in evidence a judgment roll in an action between the same parties, but which did not contain the verdict of the jury. The plaintiffs' counsel objecting to its admissibility upon this ground, the court directed it to be amended, and received it in evidence. To this the plaintiffs excepted. The defendant's counsel then offered to prove by parol, that the consideration of the note in suit was the sale of the watches and watch hands described in the complaint, forming part of the said judgment roll. To this the plaintiffs' counsel objected; but the objection was overruled, and the plaintiffs excepted. The defendant then introduced the same evidence called forth by him on cross-examination of Goodwin, and the court held it to be sufficient upon the point in question. To this the plaintiffs' counsel excepted. The court thereupon directed the jury to find a verdict for the defendant, upon the ground

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that the former judgment was a bar to this action. To which direction the plaintiffs' counsel also excepted. The plaintiffs then requested the court to instruct the jury that upon the issue made by the first or original answer, the plaintiffs were entitled to a verdict; but the court declined so to do, and the plaintiffs excepted. The plaintiffs then requested the court to submit the whole case to the jury upon the evidence; which the court refused to do, and the plaintiffs excepted. The plaintiffs then requested the court to submit the issues made by the first answer to the jury; but the court declined so to do, and the plaintiffs again excepted. The jury, under the direction of the court, found a verdict for the defendant. The court ordered a stay of proceedings for forty days, to enable the plaintiffs to make a case or bill of exceptions, to be heard in the first instance at the general term, and that the judgment in the meantime be suspended.

George F. Danforth, for the plaintiffs.

J. C. Cochrane, for the defendant.

By the Court, JOHNSON, J. The supplemental answer provided for by section 177 of the code is undoubtedly, in one sense, a substitute for the former plea *puis darrien continuance* in actions at law, as claimed by the plaintiffs' counsel. But it is also in the same sense a substitute for the supplemental answer allowed under the former practice in suits in chancery. The general rule in actions at law was, that the plea *puis darrien* was a waiver of all former pleas, and made the only issue to be tried in the action. This was not so, however, when the latter plea was not inconsistent with the former pleas. (*Rayner v. Dyett*, 2 *Wend.* 300.) In suits in chancery, on the contrary, a supplemental answer was never regarded as a waiver of the first answer. It was, as its name implied, an addition to the first answer, and in substance and effect an amendment to it. And the defendant, in his supplemental answer, was not allowed to contradict the

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statements in his first answer. (1 *Barb. Ch. Pr.* 165, 166, 167.) The legislature, in allowing supplemental complaints and answers, intended, I think, to follow the former chancery rule, and thus chose terms which import something additional or amendatory, to what has gone before. This was substantially so decided by this court in *Dann v. Baker*, (12 *How. Pr. R.* 521.)

The judge at the circuit was right, therefore, in compelling the plaintiffs to open their case, and produce their evidence in support of the action in the first instance, inasmuch as the answer put in issue the making of the note and its delivery by the defendant, as well as its transfer to the plaintiffs.

The plaintiffs, as appears by the case, then proved the making and delivery of the note by the defendant, and its transfer in the usual course of trade to themselves before maturity. This evidence was not controverted by the defendant in any particular. The defendant in effect conceding that he had executed and delivered the note in question, and as part of his evidence, he proved that the note was given in consideration of the sale of a quantity of watches and watch hands, by one Goodwin to him, which had been charged in account, and that the same account, after the commencement of this action, had been assigned by Goodwin to the plaintiffs and was contained in the judgment roll, which the defendant introduced as evidence on his part. Thus the case stood upon the issues made by the original answer. There was no dispute about the fact that the defendant had executed and delivered the note, nor that the plaintiffs were *bona fide* holders. This brings us to the consideration of the important question in the case, to wit, whether the former action and judgment upon the account constitutes a bar, as against the plaintiffs, to the maintainance by them of their action upon the note. It appears by the record that the plaintiffs were defeated in the action brought to recover the account. There has been, therefore, no former recovery, of the consideration of the note, to bar the action. That action was not upon this note, but

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upon the account which now, confessedly, according to the theory upon which this action has been tried, was the consideration upon which this note was actually given. How then does the defeat of the plaintiffs in their action to recover upon that account, bar their right of action to recover upon the note? If they had recovered in their action upon the account, we can readily see how it might have operated as a bar. As assignees, the plaintiffs took the account subject to all the equities between the original parties, and subject to its *sub modo* payment, by the giving of the note. The acceptance of payment, therefore, by the plaintiffs, or enforcing its collection by action, while holding the note, would, I apprehend, as matter of law, operate to pay and extinguish the note. But the plaintiffs failed entirely to obtain satisfaction of their debt, by their action upon the account. This the record established conclusively. It established also, conclusively, that the plaintiffs had no right of action upon the account. But did it establish, as matter of law, that the plaintiffs had no right of action upon the note? Clearly not. Suppose, as appears from the record, that the plaintiffs were defeated in that action, on the ground that there was no such transaction as the alleged sale, and no account in fact between Goodwin and the defendant, at any time. How would this affect the note, in the hands of *bona fide* holders? The note, it is quite obvious, might be entirely good in such hands, even if it had no consideration. A judgment, to the effect that the account was a mere pretended claim, and never had any validity, would not prove conclusively, even if it tended to prove, that the note was never executed and delivered. Indeed, as has been before remarked, the execution and delivery of the note, by the defendant, seem not to have been disputed upon this trial. A judgment, to constitute a bar, must, as all the cases agree, be upon the very point in issue. Both actions must be in substance and in point of law identical, and the same evidence admissible, and to some extent controlling in both. (*Miller v. Manice*, 6 Hill, 114.

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1 *Smith's Lead. Cas. n. 443, 545. C. & H. Notes, 832, 833, 834.*) But if the second action involves no inquiry into the merits of the former judgment, and is sustainable on grounds entirely independent of such former judgment, it is not barred. That is precisely the case here. The trial of the former action involved the inquiry whether there ever was in fact any such transaction or account between Goodwin and the defendant as the plaintiffs alleged in their complaint, and the verdict and judgment determined that issue conclusively in the defendant's favor. The only material inquiries in this action were—1st, whether the defendant made and delivered the note to Goodwin; and 2d, whether the plaintiffs took it in the usual course of deal before it fell due. If this was so, it was wholly immaterial, so far as the rights of the plaintiffs were concerned, whether there was ever any bargain and sale, or any subsisting account, between Goodwin and the defendant or not. The point determined by the judgment was wholly immaterial, upon either of these issues, and was incompetent evidence to establish a bar.

It is not claimed on the part of the defendant that the plaintiffs, by taking an assignment of the account and attempting to collect it, have waived any of their rights, as *bona fide* holders of the note, and placed themselves in the same situation in respect to it that Goodwin, the payee, would have occupied had he been plaintiff; nor do I see any ground upon which the assignment and action could produce any such legal result. The defense rests simply upon the estoppel, by the record of the former judgment, and as this created no estoppel, and the evidence, independent of it, made out a clear case for the plaintiffs, a verdict should have been ordered in their favor instead of for the defendants. There must therefore be a new trial, with costs to abide the event.

HAMILTON *vs.* GANYARD.

Where one agrees to sell and deliver a crop of corn, in "merchantable order," he is bound to deliver sound and ripe corn, and the vendee is not bound to accept any other.

In every executory contract for the future sale and delivery of articles of merchandise, the law will imply an agreement that the property bargained for shall be of merchantable quality.

Where the defendant, by a written contract, agreed to sell and deliver to S. & M. his crop of corn then growing on about thirty acres of ground, to be delivered "in merchantable order," at a specified price; *Held* that he was bound to deliver all the merchantable corn that grew on the thirty acres, and no more.

And the defendant, claiming the right to deliver the whole crop, although three-fourths of it was conceded to have been of unmerchantable quality, having tendered the good and bad together, without proposing or offering to deliver any, except in that way, *it was held* that this was not a proper tender or offer of performance; and that the purchasers were not bound to receive the corn tendered in fulfillment of the agreement, but might treat the contract as broken, and bring their action to recover the damages they had sustained.

Held, further, that what the plaintiff was entitled to recover, in such action, as damages, was the difference between the contract price and the market value of the merchantable corn growing on that piece of ground, at the time it should have been delivered, together with the amount advanced, on the contract, and interest thereon.

APPEAL by the defendant from a judgment entered upon the verdict of a jury. The action was founded upon a contract of the defendant for the sale to Smith & Mathews of his crop of corn of the year 1858. The plaintiff is the assignee of the contract from Smith & Mathews, and sues for damages for the non-delivery of the corn, pursuant to the contract.

The contract was in writing, and is as follows :

"\$50. Received from Smith & Mathews fifty dollars on account of my crop of corn, now growing on about thirty acres of ground, to be delivered to them in Rochester, in merchantable order, any time after the first day of January next, and before the first day of May next, at fifty cents

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per bushel of sixty pounds. Dated Rochester, August 26th, 1858.

(Signed)

ENOS GANYARD."

The defendant, in his answer, alleged a tender and refusal of the corn.

It was proved that the crop of corn which grew upon the thirty acres of land mentioned in the contract, was not well ripened ; that the whole crop amounted to six hundred bushels, of which only about one-fourth was sound and well ripened. The defendant, in March, 1859, offered to deliver the corn to Smith & Mathews, at Rochester, but they refused to receive it, on the ground that by the terms of the contract the defendant was bound to deliver sound and well ripened corn, and in good order. Some testimony was given by the plaintiff tending to show that the corn offered to be delivered by the defendant was not in good order, but was wet and dirty. But the testimony on the part of the defendant clearly proved that the corn was well cured and dry, and in good order. There was testimony on both sides as to the meaning of the term merchantable order. Smith, one of the firm of Smith & Mathews, and the only witness for the plaintiffs on that point, testified that by the term merchantable order, is meant clean, sound and dry corn. Several witnesses on the part of the defendant, and who were dealers in corn, testified that by the term merchantable order, is meant corn which is dry and clean, and that unripe corn, if clean and dry, is in merchantable order. The judge, however, ruled and decided that by the terms of the contract, the defendant was bound to deliver sound and ripe corn, and the plaintiff was not bound to receive any other. The plaintiff proved the price of corn to have been, on the first of May, 1859, 75 to 78 cents per bushel. The jury rendered a verdict of \$144.14 in favor of the plaintiff. The defendant excepted to the rulings of the court, and appealed to the general term from the judgment rendered upon the verdict.

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D. C. Hyde, for the appellant.

Angle & Trimmer, for the respondent.

By the Court, JOHNSON, J. The judge was clearly right at the circuit, in his construction of the contract. Corn, to be in "good merchantable order," must be of good merchantable quality. Any other construction would lead to the palpable absurdity of holding an article to be in good merchantable order, which had no merchantable quality belonging to it. One of the principal definitions of the term order is, "proper state." This includes the intrinsic or organic condition of the thing itself, as well as its extrinsic or accidental relations to other things. To say that a person is in good order, is equivalent to saying that he is in a sound and healthy condition. And so, to say of articles bought and sold in market that they are in good order, or in good merchantable order, is to affirm that they are in all respects articles of that character and quality.

But if this were otherwise, and it could be reasonably held that the express stipulations of the contract had reference only to the relative, and not to the inherent, order or condition of the corn, it could make no difference in a case like this. The law clearly would imply an agreement that the corn bargained for was to be of merchantable quality. This is implied in every executory contract for the future sale and delivery of all articles of merchandise. (2 *Kent's Com.* 479, 3d ed. *Cowen's Tr.* 316, 317, 2d ed. *Gallagher v. Waring*, 9 *Wend.* 28, per *Nelson, J.* *Hart v. Wright*, 17 *id.* 277, per *Cowen, J.*) In *Sprague v. Blake*, (20 *id.* 61,) *Cowen, J.*, at page 64, lays down the same rule. That was the case of an agreement to sell the whole of a certain crop of wheat. By the terms of the agreement the wheat was to be merchantable. But *Cowen, J.*, in his opinion, says, "that is understood of every such contract, even without express terms, while it is executory."

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The rule seems to be different, in this state at least, in regard to present sales when there is an opportunity of inspection by the purchaser, or sales by sample.

In any view of the case, therefore, this was, in law, an agreement to sell and deliver all the crop specified, which should come to maturity, so as to be merchantable corn. If the defendant had tendered the merchantable corn, which grew on the thirty acres, he would have fulfilled on his part, and no action could have been maintained against him, for damages merely, whether the quantity turned out to be one hundred or one thousand bushels. He was bound to deliver all the merchantable corn that grew on the thirty acres, and no more. But he claimed the right to deliver the whole crop, three-fourths of which is conceded to have been of unmerchantable quality, tendering the good and bad together, and did not propose, or offer, to deliver any, except in that way. This was clearly no tender or offer of performance, and the purchasers were not bound to receive the corn tendered in fulfillment of the agreement, but might, as they did, treat the contract as broken, and bring their action to recover the damages they had sustained.

It is claimed by the defendant's counsel, that the recovery is for too much, in any aspect of the case. What the plaintiff was entitled to recover, as damages, was the difference between the contract price, and the market value, of the merchantable corn growing on that piece of ground, at the time it should have been delivered, together with the amount advanced on the contract, and interest thereon.

The defendant did not guaranty, by his contract, that the crop should mature, so as to yield any definite number of bushels of merchantable corn, and he is only liable for neglecting or refusing to deliver the portion which proved to be of merchantable quality.

Upon this hypothesis, however, I do not see that the recovery is for any greater sum than is warranted by the evidence. The jury would have been warranted in finding that

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the quantity of merchantable corn, from that thirty acres, was at least 300 bushels, and that the difference between the contract, and the market price, was twenty-eight cents. This, together with the amount advanced at the time of entering into the contract, with interest thereon, would, in the aggregate, fall only a trifle short of the amount of the verdict. The jury may have found that something over one-fourth of the crop was merchantable corn, as the evidence was only an estimate of the proportion, and in no respect so certain or exact as to confine the jury specifically to that proportion. The judgment must, therefore be affirmed.

MONROE GENERAL TERM, March 4, 1861. *Smith, Knox and Johnson, Justices.*]

 McLAUGHLIN vs. MCGOVERN.

One who has, by an instrument indorsed upon a lease, guarantied the fulfillment of the covenants in the lease by the lessees, is bound by his guaranty, although the lease is executed by only one of the lessees; where it appears that both lessees occupied the demised premises, and had possession of all the personal property mentioned in the lease, for the whole term.

THIS was an action upon a special contract of guaranty. The complaint alleges, that "on the 20th day of December, 1854, by a lease of that date, the plaintiff leased and rented to Thomas Reynolds and Patrick Tague &c., his farm &c., and certain articles of personal property, for five years, at \$200 per year, payable on or before the 15th day of November in each year. That Reynolds and Tague by said lease promised to pay the plaintiff, for the use of said farm &c., the said sum of \$200, on or before the 15th of November in each year. That Reynolds and Tague took possession &c., and entered upon the enjoyment and execution of the lease or agreement &c., and have continued to occupy

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and enjoy the same &c., and still occupy and enjoy the same," &c. That the defendant signed the following agreement or guaranty :

“ *Florence, Dec. 20, 1854.*

For value received, I hereby guaranty the fulfillment on the part of said Reynolds and Tague for the part of this agreement to be performed or kept by them : as witness my hand and seal.”

That said Reynolds and Tague have not kept, performed and observed the terms of said lease and agreement as by them promised as aforesaid to be kept and observed, but have not paid as they agreed, &c. That Reynolds and Tague *being in default* as aforesaid, and *not fulfilling their agreement as by them promised and agreed*, the defendant by virtue of his covenant and promise so made as aforesaid, and above set forth, became thereby obliged and liable to pay the same. Wherefore, by reason of *the said several premises as aforesaid*, the said plaintiff brings suit, &c. The answer denied the complaint and set up special matters.

The cause was tried by a referee, who found the following facts : That the said lease from the plaintiff to Reynolds and Tague was signed by the plaintiff and Reynolds on the 20th day of September, 1854, and that the defendant, at the same time, made and executed the guaranty upon which this action is brought. That said Reynolds and Tague occupied the farm, and had the possession of the personal property mentioned in said lease, from March, 1855, to March, 1860. That the sum of \$200, the rent for the last year, was due to the plaintiff from said Reynolds and Tague on the 15th day of November, 1859. That after the same became due, and before the commencement of this action, the plaintiff demanded said rent of Reynolds and Tague ; that they did not pay the same, and the plaintiff notified the defendant of its non-payment, and demanded payment of the same from the defendant before the commencement of this action, and that the sum of \$200 and interest from November 15th, 1859, is

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still due to the plaintiff for said last year's rent. And said referee further found, as matter of fact, that Patrick Tague, one of the lessees in said lease named, did not execute said lease, and that his assent to be bound thereby as a party thereto was not proved. That the acts of the said Reynolds and Tague did not constitute an execution of said lease on the part of Tague. That said guaranty, so executed by the defendant, was not a legal and binding obligation upon him, and that the plaintiff was not entitled to recover against the defendant upon the same, in this action. That the plaintiff had not sustained his cause of action against the defendant by his proofs, and that his complaint should be dismissed with costs. To which findings and conclusions the plaintiff separately excepted. Upon the said report, judgment was entered on the 22d day of September, 1860, in favor of the defendant and against the plaintiff for \$70.61 costs of suit ; and the plaintiff appealed from the judgment.

K. Carroll, for the appellant.

Mr. Southworth, for the respondent.

By the Court, BACON, P. J. I am inclined to think that the learned referee erred in his conclusions of law that the guaranty of the defendant, upon which the recovery was sought in this case, was not a legal and binding obligation upon him. This conclusion evidently proceeds from the fact, as found, that one of the lessees did not execute the lease, although it was abundantly proved that both occupied the farm, and had possession of all the personal property mentioned in the lease, for the entire term covered by the lease. The instrument signed by the defendant is an undertaking that the lessees shall fulfill their part of the agreement to be performed or kept by them, and is indorsed upon the instrument which stipulates for the performance of certain engagements in their behalf. Is not this a good undertaking,

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although the principal contract is imperfectly executed, or even conceding that it could not be fully enforced against the principal parties? It seems to me that it is. Nothing is clearer than that a collateral contract may sometimes be recovered upon when the principal one to which it is auxiliary is entirely incapable of enforcement. Thus in an action on the guaranty of a promissory note, it is unnecessary to prove the signature of the maker, and the reason, as given by Story, is that such guaranty or indorsement by implication imports that the antecedent names on the note are genuine, and that the party subsequently indorsing and transferring the paper has a good title which he transfers. (*Story on Bills of Exch.* § 225.) If, consequently, it should turn out that the name of the maker was forged, this, I apprehend, will not discharge the indorser or guarantor. Indeed, this precise proposition is affirmed by Selden, J. in *Erwin v. Downs*, (15 *N. Y. Rep.* 576,) on the authority of *Coggill v. Am. Exch. Bank*, (1 *Comst.* 113.) This last case does not however hold this precise proposition; but it does declare what is perhaps in principle equivalent to it, to wit, that if the maker of a note puts it in circulation with a forged indorsement of the name of the payee upon it, a *bona fide* holder may sue and recover against the maker as upon a note payable to bearer. The principle which will allow a recovery against the guarantor of a forged note, will surely permit a recovery against the guarantor upon this imperfectly executed lease. The case of the note is much the strongest of the two, for a name forged is no name whatever, and the note, as to any legal operation, is no better than blank paper, and yet the party indorsing it is held to the liability he, by the mere act of indorsing, has assumed.

Then again there is a class of cases where a guarantor may be held, although no suit whatever can be maintained on the original debt, and not unfrequently where the guaranty was obtained for the very reason that the principal debt could not be enforced by law. Such are the cases where the guarantor

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undertakes to be responsible for goods to be supplied to a married woman, or when they are sold to an infant, not being necessities; and it is quite elementary that the guarantor of a principal contract which is wholly void, is yet bound by his undertaking if perfect in itself, and having an adequate consideration to support it. *Erwin v. Downs* (cited *supra*) is a decisive authority to this effect. There a recovery was had against the indorsers of the note of two married women, although the note was utterly void. Selden, J. says, "when the defendant indorsed the note, he impliedly contracted that the makers were competent to contract, *and had legally contracted*, the obligation which they assumed."

The defendant's counsel seems to suppose that this obligation cannot be enforced against the guarantor, because he could not call upon the party who did not sign the lease, for any indemnity. If this were so, I do not clearly see how that would discharge his obligation to see that the agreements in the lease should be performed. But I think the proposition is not sound, for Littleton clearly lays down the law to be, that if a lease by indenture to two lessees be executed, and one of them only signs the counterpart, but the other enters and agrees to the lease, the latter can be charged in covenant for a sum he was bound to pay the lessor in case certain conditions were not performed, because he accepted the lease. (*Co. Litt.* 231, *a.*) The lessor, then, could unquestionably have enforced the condition of this lease as to both the lessees named in it, they both having entered and occupied the premises during the term, and if so, the remedy over of the guarantor is equally effective.

What is the obligation assumed by the defendant in this case? It is not that Reynolds and Tague shall execute the lease, but that they shall fulfill the engagements contained in the instrument upon which his guaranty was indorsed. So that in this aspect of his undertaking, and this is its literal language and fair import, it does not seem to be essen-

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tial to the validity of his covenant, that the lease should be executed at all by the lessees.

The paper purported to set forth the precise extent and measure of their obligation, and that was the measure also of his undertaking, and to that extent he guarantees performance.

To meet the precise case as disclosed on the trial an amendment of the pleadings may be necessary, and this may be done as well upon the trial as by an application to the court.

For the above reasons, my opinion is that the referee erred in nonsuiting the plaintiff, and that there must be a new trial, with costs to abide the event.

[ONONDAGA GENERAL TERM, July 2, 1861. *Bacon, Allen, Mullin and Morgan*, Justices.]

HODGKINS vs. THE MONTGOMERY COUNTY MUTUAL INSURANCE COMPANY.

An insurance company is chargeable with knowledge of all the facts stated by an applicant for insurance, to the company's agent, respecting the applicant's title and interest in the insured premises. And if the applicant, on applying to such agent, for insurance, truly states to him the real condition of the property, he cannot be held to have made any misstatement, or practiced any concealment in reference to the company, notwithstanding the written application varies from such statement.

Among the conditions and stipulations attached to a policy of insurance, and subject to which it was issued and received, were the following: All persons sustaining damage by fire were forthwith to give notice to the company, and within forty days they were to "*deliver in a particular account*" of such loss or damage. Losses were payable by the company within three months after the loss should have been ascertained and proved and the statement made as above. Then followed this clause: "*All communications and notices* to the company must be post paid and directed to the secretary, at C." The statement of the loss was made out, sworn to, and deposited in the post office, inclosed in a sealed envelope, postage paid, and addressed to the secretary of the company at C., but was never received

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by the company. *Held* that the condition requiring the insured to "deliver in" the statement of loss within forty days was a positive requirement of the policy on that particular subject, which could not be deemed superseded or nullified by the general direction to forward communications and notices by mail; and that in sending such statement by mail, the insured had not complied with the conditions of the policy.

ON the 16th of April, 1855, the defendant insured the plaintiff against fire for five years from April 9, 1855, in the sum of \$1000. In the conditions annexed to the policy it was provided that when applications were filled out by the agent of the company, the company would be bound by the survey; that if the applicant make any misrepresentation or concealment or *misstate his own interest in the property*, the insurance should be void; that persons sustaining loss should forthwith give notice, and within forty days *deliver in a particular account of such loss*, signed and verified; that *all communications and notices to the company must be post paid and directed to the secretary*, at Canajoharie, &c. January 9, 1858, the house was burned, and the damage was \$1300. The plaintiff gave due notice of the loss, and on the 15th day of February, 1858, made the sworn statement of the particular account of the loss as required, and left it with his counsel to be by him forwarded to the company. The counsel regarding the statement of the account of the loss as *a communication to be made to the company*, sent it by mail to the secretary of the company, at Canajoharie, as directed in the conditions annexed to the policy. The company never received it. The house was built by the plaintiff, on land held under a contract, for the purchase thereof, from one Le Ray de Chaumont, which land was not fully paid for. There were arrears due from the plaintiff upon the contract, and no deed was due or demandable until further payment. The application was signed by the plaintiff and contained these words: "The above property is situated in the village of Carthage, and is owned and occupied by me." This statement was written by the defendant's agent, after he had been told the true state of the title, and had been shown the contract

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between Le Ray de Chaumont and the plaintiff for the sale and purchase of the premises. The defendant refused to pay, on two grounds, viz: 1st. The plaintiff's misstatement of his interest in the property. 2d. The plaintiff's failure to furnish to the company the particular account of the loss, as required by the conditions of insurance.

The motion here was to overrule these two objections and order judgment for \$1175 and costs, upon a special verdict finding the foregoing facts.

J. F. Starbuck, for the plaintiff.

F. W. Hubbard, for the defendant.

By the Court, BACON, P. J. Two questions only arise in this case, and are urged by the counsel for the defendant as a bar to the recovery—1st, as to the omission of the plaintiff to state truly his title and interest in the insured premises; and 2d, his failure to serve a sufficient notice of the proof of his loss, as required by the policy.

As to the first ground, it has already been decided by the general term in this district that knowledge in the agent by whom the insurance is agreed to be made, and who takes and fills out the applications, of the existence of incumbrances upon the title, or of prior insurances, is knowledge on the part of the company. The case of *Ames v. N. Y. Union Insurance Co.* (14 *N. Y. Rep.* 253) is in principle precisely like this, and the same doctrine is held in several other cases; the common ground upon which they proceed being that the company is chargeable with knowledge of all the facts stated by the applicant for insurance to the agent, and he having truly stated to the agent the real condition of the property, cannot be held to have made any misstatement or practiced any concealment in reference to the company. Such was the case here, as the testimony discloses, and the first objection is thus disposed of.

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The second has a more serious aspect, and I am inclined to think is a fatal bar to the recovery. Among the conditions and stipulations attached to the policy in this case, and subject to which it was issued and received, are the following: All persons sustaining damage or loss by fire are forthwith to give notice to the company, and within forty days are to "*deliver in a particular account*" of such loss or damage. Losses are payable by the company within three months after the loss shall have been ascertained and proved and the statement made as above. Then follows this clause: "All *communications and notices* to the company must be post paid and directed to the secretary at Canajoharie, N. Y."

The statement of the loss, in this case, was made out and sworn to and then deposited in the post office at Carthage, Jefferson county, inclosed in a sealed envelope, postage paid, and addressed to the secretary of the defendant at Canajoharie. This statement was never received by the company. The counsel for the plaintiff insists that this was a compliance with the condition of the policy, being, in the words of the clause, a "communication" which the insured was authorized thus to transmit. He claims that the object of the statement being to communicate information which the company called for, it comes within the precise definition of that word; and that if there is any ambiguity about it, the interpretation is to be most strongly against the party using it, and most favorably for the party to whom the word is given to construe, in accordance with the approved maxim, "*verba fortius accipiuntur contra proferentem.*" There is force in this consideration, and I am not sure that if this clause in the policy stood alone, and nothing else had been said in connection with the statement which the insured was to furnish, we should not be bound to give it that construction. But the difficulty is that there is another condition specifically pointing to this very statement or account, and which requires the party to "*deliver it in*" to the company within forty days after the loss has occurred.

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This is a positive requisition in respect to the very thing which the party undertook to do by transmitting his papers by mail, and it seems to me it can only be met by an actual delivery to some officer of the company, at its place of business. A party may doubtless, if he chooses to run the risk, send his proofs by mail, and if they are received without objection, all will be well. Such was the case of *Bumstead v. Dividend Mut. Ins. Co.* (2 Kern. 81,) where proofs were thus transmitted and shown to have been received by the company. A positive requirement of the policy on the very subject in question, can hardly be deemed superseded or nullified by a general direction to forward communications and notices by mail, and which would very well apply to the first informal and preliminary notice of loss, and as a direction to agents in their multifarious communications to the company.

To uphold the construction of the plaintiff would render the first condition wholly nugatory, and no rule of interpretation will authorize or require this. We must give effect to both clauses, if possible, so that both may stand, and we have seen that there is abundant room for both to operate and be effective. To allow a mere proof of service by mail would be exceedingly unsafe for insurance companies, and it will hardly be presumed, in the absence of an explicit authorization on their part, that they intended any such thing by a general direction which it seems to be clear had other objects in view, and can be satisfied without giving it so loose and wide a construction.

Upon the whole, although greatly disinclined to favor technical defenses on the part of insurance companies, to meritorious claims, I think the plaintiff failed to comply with the conditions of the policy which required him to furnish in season due proof of his loss, and consequently that there must be judgment in this case for the defendant.

STEDMAN *vs.* PATCHIN.

Where there are several causes of action embraced in the same complaint, and the recovery appears to be general, parol evidence is competent, to show upon which cause or causes of action specified the trial was had and judgment obtained

Such evidence does not contradict the record, unless the party is allowed to show that the judgment was upon a cause of action not specified in the complaint.

A vessel, while engaged in carrying freight and passengers between Buffalo and Chicago, touched at Cleveland, Ohio, where she was sized by the sheriff, under process issued out of the superior court of Cleveland, at the suit of one McE. upon a claim against the boat, under certain statutes of Ohio. To effect the release of the vessel the master executed a bond, under the statute, with the plaintiff and one P. as sureties, conditioned for the return of the boat to satisfy any judgment upon the claim of McE., or in default thereof, for its payment. The boat was thereupon released, and the defendant, the owner of the boat, being informed of the proceedings of the master, employed counsel and defended the suit commenced by McE., on his own account. *Held*, 1. That it was the duty of the master, from the necessity of the case, and was within his proper power, to execute the bond, and thus enable the vessel to proceed on its way.

2. That the defendant having sanctioned the act of giving the bond, as soon as it came to his knowledge, and proceeded to contest and defend the action in which the bond was given, this approval and ratification of the execution of the bond was equivalent to an antecedent authority to the master.
3. That if the statutes under which the vessel was seized were valid as to the citizens of Ohio, they were equally valid as to all parties litigating in the courts of Ohio in proceedings founded upon them, no matter where such parties resided.
4. That the proceedings and seizure being, for aught that appeared, regular, under the statutes of Ohio, the defendant, by appearing and defending the action, became bound by the judgment of the court in favor of the validity of the plaintiff's claim. That even if he was in fact a bona fide purchaser, so that the claim upon the vessel was not valid as against him, still the judgment would be binding, as long as it remained unreversed; inasmuch as the court had jurisdiction of the subject matter, and of the parties to the action.
5. That the defendant being bound by the judgment that the claim of McE., the plaintiff in that action, against the vessel, was valid, the record of that judgment was conclusive against him, in an action by the plaintiff, for the reimbursement of money he had been compelled to pay as one of the sureties in the bond.

THIS action was brought to recover the sum of \$978.52 paid by the plaintiff for and on account of the defend-

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ant, in September, 1853. In 1850, the defendant, a resident of Buffalo, New York, was the owner of the steamboat A. D. Patchin, whereof one Whittaker was master. She was engaged in running from Buffalo to Chicago. In August of that year, while on a voyage from Buffalo to Chicago, full of passengers and freight, she touched at Cleveland, where she was seized by the sheriff of Cuyahoga county, at the suit of one McEwen, under process issued out of the superior court of Cleveland, a court of competent jurisdiction, upon an alleged claim against said boat for articles furnished in building, repairing and equipping her. The proceedings upon which the seizure was made, were authorized by certain statutes of Ohio, and are set out in the case. To effect the release of the boat, the master executed a bond under the statutes mentioned, conditioned for the return of the boat to satisfy any judgment upon the claim, or in default thereof, for its payment, and procured the plaintiff and one Price to join as sureties. The boat was thereupon released, and the defendant, being informed by the master of the proceedings, employed counsel and defended the suit on his own account. Such proceedings were had that judgment was entered against the boat in November, 1852, for \$1808. Execution was issued thereon to the sheriff of the proper county, and returned by him January 12, 1853, that the boat could not be found. The boat was wrecked and lost on Lake Michigan in 1851. In February, 1853, an action was commenced against the plaintiff and his co-surety, on the bond, in the court of common pleas of Cuyahoga county, a court of competent jurisdiction, on which judgment was recovered against them May 17, 1853, for debt \$3963.38, damages \$1877.74, and costs \$7.15, and execution was awarded. The sheriff of Cuyahoga county, to whom execution was delivered on this judgment, collected of the plaintiff thereon \$978.52, September 5, 1853. The superior court of Cleveland was discontinued by statute, and its records, &c. transferred to

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the court of common pleas. This action was tried before Mr. Justice Verplanck and a jury in the superior court of Buffalo, and a verdict rendered for the plaintiff for \$1071.38, January 13, 1855, on which judgment was entered. The defendant filed a case and exceptions and appealed to the general term of that court, December 19, 1855. Two of the members of that court being disqualified to act, having been counsel in the case, it was certified to the supreme court. The case was heard at the general term in November, 1858, and a new trial granted. The action was tried before Mr. Justice GREENE and a jury, at a circuit court in Erie county, on the 13th of October, 1859, and a verdict rendered for the plaintiff for \$1340.01; and the jury, in answer to special interrogatories, found also, 1st. That Whittaker, at the time he bonded the boat, had no direct authority to procure sureties, aside from his relation as master of said boat; and 2d. That the defendant subsequently ratified and sanctioned the bonding of the boat. On which judgment was entered for the plaintiff, November 21, 1859.

The defendant having tendered a bill of exceptions, appealed to this court from the judgment.

Two of the justices of the supreme court for the eighth district being disqualified for hearing said cause, it was by order of that court transferred for hearing before the general term of the seventh district.

T. E. Cornwell, for the appellant.

A. P. Laning, for the respondent.

By the Court, JOHNSON, J. The exception upon which a new trial was granted, when this cause was before this court, on a former occasion, in the eighth district, was fully obviated on the second trial at the circuit, by parol proof that the damages upon the trial of the action against the plain-

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tiff on the bond, were assessed upon the bond only. This parol evidence was objected to, upon the trial, on the ground that it contradicted the record; and that objection is now insisted upon. But the parol evidence did not contradict the record. The bond was declared upon as one of the causes of action, and it is well settled that where there are several causes of action embraced in the same complaint, and the recovery appears to be general, parol evidence is competent to show upon which cause or causes of action specified the trial was had, and judgment obtained. (*Gardner v. Buckbee*, 3 Cowen, 120. *Wood v. Jackson*, 8 Wend. 9.) Such evidence does not contradict the record, unless the party is allowed to show that the judgment was upon a cause of action not specified in the complaint.

It is claimed, on the part of the defendant, that the bond in question, not being in exact conformity with the statute of Ohio, was void. The same objection was taken, and decided against the defendant, on the former appeal in this action, upon reasons which appear to me satisfactory, as they were to the court in which the case was decided. The bond, as respects its form and conditions, was good, if the proceedings under the statute were regular, and the statute itself valid.

There is no force in the objection that the bond is void, for want of authority in the master to execute it, in order to discharge the vessel from the warrant of seizure. I am inclined to the opinion that it was the duty of the master from the necessity of the case, and was within his proper power, to execute the bond in question and thus enable the vessel to proceed on its way with its passengers and freight. But whether this be so or not, the defendant sanctioned the act of giving the bond, as soon as it came to his knowledge, and proceeded to defend and contest the action in which such bond had been given. This is established by the verdict, and appears very clearly in the evidence. This approval and rat-

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ification of the execution of the bond are equivalent to an antecedent authority, if such were necessary, and completely disposes of the question of want of authority.

I do not perceive the force of the defendant's position in his first point, that the Ohio statutes under which the vessel was seized were void as to citizens of this state. They certainly had no extra territorial force. But there were no proceedings under them out of the state of Ohio. The proceedings under those statutes were all in that state, and before its regularly constituted tribunals. If the statutes were valid as to the citizens of Ohio, they were equally valid as to all parties litigating in the courts of Ohio, in proceedings founded upon them, wherever such parties resided. (*Story's Conflict of Laws*, § 541.) The plain and elementary principle that every state has exclusive jurisdiction over its own remedial laws, and may make such provision as it deems suitable, for the collection of debts by attachment, or otherwise, within its own territory, and before its own tribunals, is admitted by Mullett, J. in *De Witt v. Burnett*, (3 Barb. 97.)

The only question which can, as it seems to me, legitimately arise is, whether the proceedings against the vessel were valid, and the judgment under them binding as against the defendant. Of course, the statute of Ohio could not create a lien upon a vessel lying in the waters of this state, for a debt created here, while the vessel was thus situated. But I do not see why the state of Ohio may not by statute give the creditor residing here, when he comes into that state, a right to attach such vessel whenever it may come there, to enforce the payment of such debt. The action in such a case is not to enforce a lien existing previously, but to create one by the service of the process upon the property. For aught that appears, the proceedings and seizure were regular under the statute, and I think the defendant, by appearing and defending the action, became bound by the judgment, as respects the vessel seized, which was the party to the

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record. He defended the action against his vessel, and was bound by the judgment of the court, that the plaintiff's claim was valid against it. Even if he was in fact a bona fide purchaser, so that the claim was not valid upon the vessel, as against him, under the statute, still the judgment would be binding as long as it remained unreversed, inasmuch as the court had jurisdiction of the subject matter and of the parties to the action. If he was bound, as I think he most clearly was, by the judgment that the plaintiff's claim in that action was valid against the vessel, the record of that judgment was conclusive against him in this action. This, I think, would follow as a necessary consequence. The plaintiff, upon that judgment, became entitled, as matter of unquestionable right, to the return of the vessel in satisfaction of the execution, or to payment of the amount of the judgment, in money, according to the condition of the bond. As the defendant did not return the vessel the bond was forfeited by him, and the plaintiff became liable to pay according to his undertaking. This liability has been enforced against him by action, and of course he must have his remedy against the defendant, to reimburse himself.

The objection taken to the record as evidence on the trial, on the ground that the certificate was signed by the deputy clerk instead of the clerk, was not well taken. The certificate of the presiding judge, that the attestation is in due form of law, is conclusive as to the authority of the deputy clerk to certify, in Ohio. (*Cowen & Hill's Notes*, 1132, 1133.)

I do not see that the plaintiff was under any obligation to give the defendant notice of the action against him, upon the bond. There was no defense to the action, as we can now plainly see. But if notice was necessary, it was given, as the jury have found, and as the evidence tends to show, in time to have enabled the defendant to defend, had he seen proper to do so.

I am of the opinion, therefore, that the court properly di-

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rected the jury to find a verdict for the plaintiff, and that none of the exceptions taken to the charge, or to the refusal to charge as requested, are well taken.

The judgment must consequently be affirmed.

[MONROE GENERAL TERM, September 2, 1861. *Smith, Knox and Johnson*, Justices.]

DIVEN, receiver, &c. vs. PHELPS.

Where bills of a bank are obtained by one of its debtors after it becomes insolvent and stops payment, they cannot be used as a set-off or counter-claim, in an action brought by the receiver of the bank, upon a promissory note of the debtor, held by the bank at the time of its failure.

Under the statute, the moment a moneyed corporation becomes insolvent, the rights of all its creditors attach equally, to all its assets; and whoever takes its bills, afterwards, being indebted to such corporation, takes them subject to this right of all the creditors to share equally in its assets. His claim is upon the assets, for his proportionate share.

APPEAL from a judgment entered at a special term, after a trial at the circuit before a justice of this court without a jury. The defendant, on the 29th day of July, 1857, executed and delivered to the Yates County Bank his note for \$500, payable in forty-five days from that date, with interest. On the 21st day of September, 1857, the bank, then holding that note, stopped payment, closed its doors, and did not afterwards transact business. On the 9th day of October, 1857, proceedings were commenced by petition before a justice of this court to have the bank declared insolvent, and a receiver appointed; and on the 9th of November the prayer of the petition was granted, and the plaintiff appointed receiver. As early as November 1, 1857, the defendant was the owner and holder of notes of the Yates County Bank to the amount of \$513, which on the 21st of November, 1857, he tendered to the receiver in payment of his note,

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which were refused by the receiver. This action was commenced by the receiver in June, 1860, to recover the amount of the \$500 note. On the trial before the judge, without a jury, the defendant produced and proved the \$513 of bank notes, and proved the tender of them to the receiver, November 21, 1857, (the next day after the defendant received notice of the appointment of the receiver,) in satisfaction of the note, and claimed to have them set off against the plaintiff's demand. The right of set-off was denied, and the defendant excepted. On the trial, the plaintiff gave in evidence a record of judgment in the supreme court in favor of Peter S. Oliver against the Yates County Bank, showing that a receiver of said bank was appointed, and final judgment entered, and the record filed October 15, 1857. The defendant excepted to the admission of this evidence. A motion for a nonsuit, on the ground that proof of this prior appointment of a receiver showed that the plaintiff had no title to the note, was overruled, and the defendant excepted.

H. R. Selden, for the appellant. I. The record in the Oliver suit was improperly received in evidence. It was not within the issue; and it was calculated to prejudice the defendant.

II. The motion for a nonsuit should have been granted, for the reasons assigned when the motion was made. After the appointment of one receiver of "the property and effects of the bank," there was nothing left of the property and effects *then held* by the bank which a subsequent receiver could take. The last receiver would hold all the property obtained by the bank after the time of the appointment of the first receiver, and no other.

III. The bank notes held by the defendant, prior to the appointment of the receiver, were proper set-off against the demand of the plaintiff. (1.) The receiver in this case was appointed by virtue of the statute of 1849, chap. 226, § 9, p. 343. (2.) Such receiver becomes vested with the property

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of the corporation, only from the time of the filing of the security which he is required to give; which in this case was the 18th of November, 1855. (*Act of 1849, ch. 226, § 11. 3 R. S. 764, § 51, 5th ed. Id. 770, § 78.*) (3.) The right of set-off therefore existed in favor of the defendant, before the plaintiff obtained title to the note, or any interest in it. (*2 R. S. 534, § 18. 3 id. 634, § 12, 5th ed.*) (4.) The transfer of the right of action was, by the express provisions of the statute, subject to this right of set-off. (*Code, § 112.*) (5.) The special provisions of the statutes directing and limiting the allowance of set-offs by the trustees of insolvent debtors, (to which reference is made in § 11 of the act of 1849,) cannot be made applicable to receivers appointed under the last mentioned act, and consequently set-offs, to be allowed by such receivers, must be governed by the general provisions as to set-offs contained in the revised statutes and code above referred to. (6.) There are no such proceedings under the act of 1849, *in any one particular*, as those pointed out in the insolvent law, to fix the time when the right of set-off must have existed, to justify its allowance by the trustees. (*3 R. S. 115, § 9, 5th ed.*) (7.) One provision of the statute in regard to insolvents may apply, and that would limit the set-off to such demands as would be entitled to dividends. (*3 R. S. 121, § 41, 5th ed.*) (8.) There can be no doubt that the defendant would have been entitled, if he had not owed the bank, to dividends on the \$513 bank notes, which he held before the appointment of the receiver. (*Laws of 1849, p. 344, § 12. Holbrook v. Receiver, &c. 6 Paige, 220, 227.*) The terms "creditors of such corporation," in the 12th section of the act of 1849, must mean, all who are creditors when the receiver was appointed; and if that be so, the right of set-off exists now, as it existed when the receiver was appointed. (*Miller v. Receiver, &c. 1 Paige, 445.*) (9.) The decisions referred to at the special term are not applicable to the present case, as they were made under the law of 1825, (*ch. 325, § 17, p. 453,*) which differed very

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materially from the act of 1849. Nor, if the statute was the same, was the point *decided* in any of the cases referred to. In *Haxton v. Bishop*, (3 *Wend.* 13,) the note sued on had passed to the receiver *before it became due*. In *Miller v. Receiver, &c.* (1 *Paige*, 445,) no question of this kind was presented. So far as that decision goes it is favorable to our set-off, as the chancellor shows in the later case of *The Receiver of the Middle District Bank*, (1 *Paige*, 585.) And the *dictum* of the chancellor in that case, (p. 586,) which is relied upon by the plaintiff, is founded on an erroneous view of what had been decided by the supreme court in the Greene County Bank cases, as will appear by the statement of those decisions in a note to *Haxton v. Bishop*, (3 *Wend.* 23,) and by the opinion of Savage, Ch. J. in that case. (See *pp.* 22, 23.) We understand the opinion of Ch. J. Savage in that case to be *with us*, as was clearly the opinion of Woodworth, J. in the case of the Niagara Bank, (9 *Cowen*, 413.) (10.) If the bank had been an *individual* who failed, holding the defendant's note, and of whose effects a receiver was appointed, there is no doubt the defendant could set off notes of such failing creditor, obtained between the time of the failure and the appointment of a receiver, and no reason is perceived why a different rule should prevail where one of the parties is a corporation. The court has no power to make a different rule, unless the statute has made it, and we deny that any such statute exists.

D. B. Prosser, for the plaintiff. I. The finding of facts by the court ought not to be disturbed. Such finding should be held conclusive; because, 1st. The case does not purport to contain all the evidence. This court, without having all the evidence before it, cannot determine whether the findings are in accordance with the evidence given on the trial. 2d. The defendant wholly failed to prove or identify a single bill which he held at the time the bank failed. Before the defendant would, under any circumstances, be allowed to set

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off the bills of the bank held by him, he was bound to prove affirmatively what particular bill or bills he had at the time of presenting the petition for the appointment of a receiver.

II. The defendant was not entitled to have the bills obtained by him, after the bank failed, set off in this action; because, 1st. The provision of the statute entitled "Regulations to prevent the insolvency of moneyed corporations, and to secure the rights of creditors," prohibit such corporations from making any payment after insolvency, with a view of giving preference, &c. (1 R. S. 591, § 9.) 2d. To allow the set-off claimed in this case would be giving the defendant preference and priority over the other creditors, in contravention of the statute. 3d. The provision of the statute was evidently intended to secure the equal distribution of the effects of moneyed corporations among the creditors. If one creditor can, by purchasing the bills as attempted in this case, and set the same off against a debt due from him to such corporation, the statute has failed to secure the rights of the creditors. (*Miller v. The Receiver of the Franklin Bank*, 1 Paige, 444. *In the matter of the Receiver of Middle District Bank*, Id. 585. *Haxtun v. Bishop*, 3 Wend. 23. 9 Cowen, 413, n. *Robinson v. Bank of Attica*, 21 N. Y. Rep. 406. *Brower v. Harbeck*, 5 Seld. 589.) The judgment should be affirmed with costs.

By the Court, JOHNSON, J. The bank suspended business, closed its doors and was insolvent on the 21st September, 1857. It then held the defendant's note, which was over due. On the 1st of November, 1857, the defendant had in his possession \$513 of the bills of the bank, which he had procured, and which he offered on the 21st of that month, to the receiver, in payment of his note. The receiver was appointed on the 9th of November, in pursuance of proceedings instituted on the 9th of October previous, and upon which the bank was declared insolvent. The bills, having been obtained by the defendant after the bank had suspended and

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become insolvent in fact, could not, I think, be used as a set-off or counter-claim, against the note in this action, brought by the receiver.

After the defendant had procured these notes, he held them as a demand against the bank, and it is quite obvious, I think, that the bank could not then have paid this demand in any way. It was absolutely prohibited by statute from doing so. (1 R. S. 591, § 9.) This prohibition extends to all conveyances, assignments, transfers, payments, judgments suffered, liens created, or securities given by a bank when insolvent, or in contemplation of insolvency, with the intent of giving a preference to any particular creditor. If the bank, before the appointment of the receiver, had given up the defendant's note, in satisfaction of his claim as holder of the bills, the transaction would have been void, and the note thus given up might have been recovered of the defendant, as part of the assets belonging to such bank, or the creditors thereof. A recovery, as has been held, may be had, whether the party receiving the payment knew of the insolvency or not. (*Brouwer v. Harbeck*, 5 Seld. 589. *Robinson v. The Bank of Attica*, 21 N. Y. Rep. 406.)

Before the defendant procured his bills, the bank held the note against him, and the latter being insolvent, the note belonged equally to all the creditors of such bank. If the defendant could be allowed to purchase, or receive, the bills of the insolvent bank, and with them satisfy, and thus take from the assets, this amount, or any other, the policy of the statute, which is to secure perfect equality among all the creditors of insolvent corporations of this description, would be entirely defeated. The statute expressly provides, that every person receiving by means of assignment, or payment, any of the effects of such corporation, shall be bound to account therefor, to its creditors, or stockholders, or their trustees.

If the defendant could not lawfully receive his note, in satisfaction of his claim, as holder of the bills, thus procured,

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but would have been liable had he taken it, to account to the receiver therefor, it must follow, I think, that the bills were not the subject of a set-off or counter-claim in this action. The chancellor so held and instructed the receiver in the *Matter of the Receiver of Middle District Bank*, (1 *Paige*, 585.) The chancellor, in that matter, says, that it had been so decided by the supreme court, in one of the suits brought by the receiver of the Greene County Bank. But the chancellor was either mistaken in regard to what the supreme court had decided, or the case referred to has not been reported. The point certainly was not decided in the reported case of *Haxtun v. Bishop*, (3 *Wend.* 13,) nor does it appear to have been decided in the four cases previously decided, which are referred to in the note to that case. In the reported case, the defendant's note was not due at the time of the failure of the bank, nor at the time the receiver was appointed. And although the defendant obtained the bills of the bank after its failure, they were held not to be a set-off, because the note was transferred to the receiver before it fell due, who took it as trustee for all the creditors.

In the head note to the case of *Niagara Bank v. Roosevelt*, (9 *Cowen*, 409,) the same rule is asserted, that "bills obtained by the solvent debtors of a bank, after it has stopped payment, though before a receiver be appointed, are not admissible as a set-off against the bank." The question, however, did not arise in the case, and that part of the head note is taken from the note at the foot of the case, which contains the case, before cited as reported in 1 *Paige*, 585. I infer that this was one of the questions upon which the receiver desired instructions in that case, but as it was an *ex parte* matter, perhaps the decision ought not to be regarded as conclusive authority upon the question. But I regard the principle as sound, and as necessarily flowing from the provisions of the statute, and from the decisions of the court of appeals, in the two cases before cited.

There is undoubtedly some difficulty in reconciling this rule

with the provisions of the statute, on the subject of set-offs, or those relating to counter-claims under the code. It was held, however, in *Haxtun v. Bishop*, (*supra*,) that the receiver is not a trustee for the bank, but for the creditors, and represents the latter only. If this be so, then the right to set off the bills in the action clearly did not exist, unless they constituted a claim against the creditors, or might have been set off as against them, had they brought the action, within sub. 10 of § 18 of 2 *R. S.* 354. The true principle I conceive to be this, that under the statute, the moment a moneyed corporation becomes insolvent, the rights of all its creditors attach equally, to all its assets, and whoever takes its bills afterwards, being indebted to such corporation, takes them subject to this right of all the creditors to share equally in its assets. His claim is upon the assets, for his proportionate share. The statute which forbids a corporation, under such circumstances, to pay, or secure, one creditor in preference to another, and makes the creditor thus paid, or secured, liable to account to the other creditors or their trustees, virtually secures to the creditors collectively the entire and exclusive right to all the assets the moment the insolvency takes place. The debtor must pay his debt and take his dividend, for his claim, arising from his ownership of the bills acquired under such circumstances. A bank, as long as it is solvent, is bound to take its own bills in payment of debts owing to it; but when it becomes insolvent, and after the rights of all its creditors have attached, a debtor then takes the bills of the bank subject to the rights of other creditors to enforce his obligation against him, for the equal benefit of all. It is possible that a defendant, in such a case, at the suit of the receiver, might set off, or have allowed by way of counter-claim, the amount or proportion to which he would be entitled as a bill holder, on the final winding up and distribution among the several creditors, if that amount could be ascertained and determined at the time of the trial. But it is unnecessary to decide that question, as it is not pre-

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sented by the case. The nominal amount of the bills was set up in the answer, as a set-off, or counter-claim, against the note, and that was the purpose for which the evidence was offered.

There is nothing in the case to show what amount would be realized from the assets, or what the defendant's share would be ultimately, and probably it could not have been ascertained at the time of the trial. The claim was, therefore, in my opinion, properly rejected, as a set-off or counter-claim, by the learned judge at special term.

I do not perceive that the defendant could possibly have been prejudiced by the introduction of the record in the other action, in evidence. The regular appointment and title of the plaintiff, as receiver, is admitted by the answer, in effect, and the admission of that record, although wholly irrelevant to the issue, could have worked no possible injury to the defendant, and is therefore no ground for a reversal.

The judgment must therefore be affirmed

[MONROE GENERAL TERM, September 2, 1861. *Smith, Knox and Johnson*, Justices.]

PUTNAM vs. CROMBIE.

Upon a trial of issues of fact, there can be no review, on a motion for a new trial, until there has been some determination of such issues, upon which a judgment may be rendered.

While the matter tried is still before the judge, or referee, or jury, undecided, and no judgment can be entered, for that reason, there can be no review, as on a motion for a new trial.

The proofs in an action pending before a county court, being closed, the judge, after hearing counsel, drew up a written statement of certain findings of fact, and conclusions of law, which statement was not signed by him, or filed, or delivered to the party in whose favor it was made, nor was any order entered upon it, as a decision of the matters in issue. It recited that certain facts deemed important did not appear from the evidence be-

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fore the court, and ordered that the parties should produce witnesses before the judge, on a day named, touching those matters. An order was thereupon entered, for the production of such witnesses before the court, on a day specified. On that day the defendant appeared and examined a witness, as to the matters mentioned in the order. The case was thereupon submitted to the county judge, who held the matter under advisement, for the purpose of assessing and fixing the amount to be allowed the defendant, when his term of office expired. *Held* that the trial had, in fact and in law, not been finished when the county judge went out of office, there having been no decision by which he was bound or concluded; and that consequently there was nothing to review, upon a motion for a new trial. A trial of the issues, *de novo*, was therefore ordered.

Evidence taken orally, before a former county judge, in an action pending in the county court, cannot be ordered to stand as evidence, upon a new trial of the cause before his successor.

APPEAL from an order of the Monroe county court, granting the plaintiff's application for a new trial. The action was for the foreclosure of a mortgage made by the defendant, John Crombie, to John Fairbanks and the defendant, James Connolly, for the purchase money of the property therein described. The complaint alleged the transfer by John Fairbanks of his interest in the mortgage to James Connolly, and the assignment of the same by James Connolly to the plaintiff, with a guaranty of payment. The defendant Crombie defended, upon the ground that Connolly, acting for himself and in behalf of Fairbanks, made false representations in reference to the adaptability of an article of machinery called the "Ross Mill," to grind powder material; and that Connolly and Fairbanks "well knew the representations to be untrue at the time they were so made as aforesaid." The case states that at the close of the testimony, the court, after hearing the counsel for the respective parties, rendered its decision in the action, as follows:

"This was an action to foreclose a mortgage tried before me as county judge, without a jury; on the trial the execution of the bond and mortgage mentioned in the complaint was admitted, and it appeared that the same had been duly acknowledged and recorded as stated in the complaint; and

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the several assignments set forth in the complaint, by which the plaintiff became sole owner of the bond and mortgage, with a guaranty of payment thereof, was also admitted. It also appeared that there was due for principal upon said bond and mortgage the sum of \$2000, and for interest due and payable on the — day of September, 1855, \$496.27; that the whole amount due and to become due was \$6632.60; that the interest on the \$4000 not due at the time of the trial was \$134.24. Notice of *lis pendens* was duly filed April 28, 1855. All the foregoing facts were admitted either by the pleadings or orally by the counsel upon the trial. As to the litigated matters, I find the following facts to be true: That for several years previous to the execution of the bond and mortgage, the mortgagees, John Fairbanks and James Connolly, were partners in business, residing in Rochester, Monroe county, owning in fee the land described in said mortgage, and having thereon the necessary buildings and material for the manufacture of powder; and had been for the several years aforesaid engaged in the manufacturing of powder upon the said lands. That on or about the 14th day of March, 1854, the said Fairbanks & Connolly being then in negotiation with the said John Crombie for the sale to him of the one undivided third part of the said land, the said Connolly, to induce the said Crombie to purchase, stated and represented to him that by means of certain mills, (known as the Ross Mills,) then recently introduced into said powder manufacturing establishment, which he had tried and found to work well, the said establishment could manufacture 150 kegs of powder per day, at a profit of 80 cents per keg; that the powder mills were in good condition, all ready to run; that the buildings were so located that if one should explode, the other would not be injured; that he had tried the Ross Mills and found them to work well. I further find that said Crombie, induced by such representations, purchased one undivided third part of said lands, buildings and machinery, for the manufacture of powder, agreeing to pay

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therefor the sum of six thousand dollars and interest, as was described in said bond and mortgage; that on the 20th day of April, 1854, the said Fairbanks & Connolly conveyed the undivided third part of said lands, buildings and machinery to the said John Crombie, who to secure the purchase money executed to them the said bond and mortgage. I further find that the said Connolly had not tried the said Ross Mills, and found them to work well; and that the said powder mills, with the said buildings and machinery, could not manufacture powder of an average amount of more than 50 kegs a day. And I further find that the said Connolly knew, at the time he made the representations aforesaid, he had not tried the Ross Mills, so as to be able from such trial to form an opinion that they would work well; but on the contrary, entertained doubts whether they would be sufficient or useful in the manufacture of powder. I further find that the said mills were unsafe and unfit to be used in that business. Now, inasmuch as it does not appear that the powder mills cannot, by an additional expense, be made to manufacture one hundred and fifty kegs of powder per day, and if they can, at what expense this can be done, it is ordered that the parties produce witnesses before this court on the 11th day of October, 1855, at 10 A. M. relative to the following questions: 1st. Can the said manufactory be made to manufacture one hundred and fifty kegs of powder per day? 2d. At what expense can this be done?"

It was conceded by the attorneys for the respective parties that in pursuance of the said decision an order was duly entered in accordance therewith, on the 8th day of October, 1855, directing the parties to produce witnesses before the court on the 11th day of October, 1855, at 10 A. M. relative to the questions specified by the county judge; and "that on or about the 12th day of October, 1855, the defendant in this action, upon due notice to the plaintiff, appeared in the said county court, before the said judge thereof, and took testimony of one witness in regard to the matter so decided

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and reserved in and by said decision and order ; that the case having thereupon been submitted to the court, the same is still held under advisement, for the purpose of assessing and fixing the amount to be allowed to the defendant, John Crombie, by reason of the several matters set up in his answer, and decided by the said court, as aforesaid ; and that no other or further proceedings have been had in the said action." It was further conceded, that Hon. H. Humphrey's term of office as Monroe county judge expired on the 31st day of December, 1855.

Subsequently the plaintiff moved for a new trial, on a case and exceptions, and also on the ground of newly discovered evidence ; which motion was, at the October term of the county court, in 1860, granted by Judge Chumasero, the successor of Judge Humphrey. And it having been suggested, on the argument, that certain of the defendant's witnesses were dead, or absent, it was further ordered that the defendant be permitted, at his election, to read the testimony of any of the witnesses given upon the former trial, on the re-trial of the action, with the like effect as though said witnesses were personally present, and then examined anew.

M. S. Newton, for the appellant.

H. C. Ives, for the respondent.

By the Court, JOHNSON, J. I am clearly of the opinion that there must be, in this case, a trial of the issues *de novo*, irrespective, wholly, of any question considered by the county judge, or discussed by counsel in their points upon the argument. The trial had, in fact and in law, never been finished when the county judge, before whom the parties were proceeding, went out of office, and there was, consequently, nothing to review. Upon a trial of issues of fact there can be no review, on a motion for a new trial, until there has been some

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determination of such issues, upon which a judgment may be rendered.

As long as there has been no determination, by which either party or court is concluded, so long there can be no review, for the simple reason that until the evidence is entirely closed, or while the matter is under advisement upon the evidence, the court, or tribunal before whom the suit is had, may of its own motion open the case for further evidence, and arrive at different conclusions from those which may have been informally announced, or announced in form, without being made matter of record. In short, while the matter tried is still before the judge, or referee, or jury, undecided, and no judgment can be entered for that reason, there can be no review, as on a motion for a new trial.

Here all the issues were on trial before the county judge. The case states that the proofs were closed, and after hearing counsel for the respective parties, the court rendered its decision "as follows." Then follows what is claimed to be a decision, which appears to have been a written statement of the judge, of certain findings of fact, and conclusions of law by him. This statement does not appear to have been signed by him, or filed, or delivered to the party in whose favor it was made, nor was any order entered upon it, as a decision of the matters in issue. It concludes with a statement that certain matters, supposed by the judge to be important, did not appear from the evidence before him, and an order that the parties produce witnesses on a certain day named, before him, touching those matters. Thereupon, as the case states, an order was entered for the production of such witnesses, before the court, by the parties, on the 11th of October, 1855. This is the only order which appears to have been entered after the commencement of the trial. The case then shows that on or about the 12th day of October, 1855, the defendant, upon due notice to the plaintiff, appeared and took the testimony of one witness, in regard to the matters specified in the order, and that the case was thereupon submitted to

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the court, and the judge held the matter under advisement, for the purpose of assessing and fixing the amount to be allowed the defendant, when his term of office expired on the 31st of December, 1855.

While the judge had the case thus before him, under advisement, what was there to prevent his ordering further testimony to be produced not only upon the matters specified in the order, but upon any other question of fact in the case, or from coming to a different conclusion, as to the facts established by the evidence? Nothing whatever. The decision, as it is called, as far as it had been announced, being neither signed by him, nor filed as his decision, was a mere memorandum of his own, which he was at perfect liberty to revise, and change, as his judgment upon further consideration might dictate.

The case, in this situation, before the judge, is quite analogous to that of *Ayrault v. Sackett*, (17 How. Pr. R. 461,) where the referee had announced his decision verbally, and written an opinion, which he had delivered to the attorney of one of the parties, but had not delivered his report to the successful party, or caused it to be filed. It was there held that the case was still before the referee, and he might at that stage open the cause for further evidence, and if he saw fit make a new or different report. That decision was affirmed at general term.

It is urged by the defendant's counsel that the case may be taken up by the present county judge, on the evidence before his predecessor, and on the footing of what is claimed to have been his decision, and determined, after hearing testimony on the subjects specified in the order. But I do not see how this can be done. I have endeavored to show that here was no decision by which even the predecessor was in any respect bound or concluded, upon any ground, other than mere tenacity of opinion. It rested in opinion merely, and ought not, surely, to be held to conclude any other judge, who may be called upon to decide the case, so that a judg-

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ment may be rendered. Another judge, or a jury, might find differently upon the same evidence, in regard to the facts.

Nor do I see how the evidence taken orally before the former judge can be ordered to stand as evidence upon the new trial. Parties may doubtless stipulate that it shall be taken as the evidence, and it would then be regarded as proper evidence in the cause in any future proceeding. But the object of the statute in directing evidence to be taken by the examination of witnesses in open court, was to enable the judge or jury, whose duty it became to determine the facts from the evidence, to judge of the credibility of witnesses, and determine the weight to be given to the testimony of each, in some measure from his appearance and manner upon the stand. If a new trial is to be ordered, as I think it must, I know of no power in the court to make any such order. It would be contrary to all rule and precedent in granting new trials.

For the foregoing reasons, I am of opinion that there must be a trial *de novo* in this case.

[MONROE GENERAL TERM, September 2, 1861. *Smith, Johnson and Knox, Justices.*]

LAMPORT and ALLEN, executors &c. *vs.* BEEMAN, adm'r &c.
and others.

Heirs or devisees can compel an executor or administrator to pay the purchase money remaining unpaid upon lands purchased by the testator or intestate and held by him under a contract, at the time of his death, out of the assets in the hands of such executor or administrator.

The contract debt, for the purchase money, is not a mortgage, within the intent and meaning of the statute making mortgages given by an ancestor or testator a charge upon the land descending to an heir or passing to a devisee, to be paid by the heir or devisee, unless there be an express direction to the contrary in the will. (1 R. S. 549, § 4.)

The provision of the statute is confined exclusively to lands descending or passing by devise, subject to a mortgage "*executed* by any ancestor or

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testator." It refers to no other charge or incumbrance whatever, legal or equitable.

Where an executrix agreed to pay all the debts of the testator, if her co-executors would give up the whole estate to her, to which they assented, and she thereupon took the assets and paid the debts; it was *held* that the agreement was founded on a good consideration, and was binding upon her; and that the same having been fully executed, on her part, her administrator, after her death, could not gainsay it, nor claim any thing from it, as against any person interested in the remainder.

APPEAL by the defendant Beeman from a judgment entered at a special term, upon the judgment of a referee. On or about the 15th of April, 1835, Consider Lucas, of Canandaigua, Ontario county, died, leaving a will by which he directed his debts and funeral expenses to be paid, in preference to any devise or legacy therein; then bequeathed to his brother Benjamin \$50, and his sister Kesiah \$25; and next gave to his widow, for her support and benefit during her life, the use of the residue of his personal and real estate and property. The value of the said personal and real estate and property, at the death of his widow, was given, one-half to the treasurer of the Baptist General Convention of the United States for Foreign Missions, for the circulation of the bible in foreign countries; one-fourth to the treasurer of the Baptist Missionary Convention of the State of New York; the other fourth to the trustees of the First Baptist Society of the village of Canandaigua. The plaintiffs and the said widow were made executors and executrix of the will. The testator left some personal property, and a contract for the conveyance, to him, of a small parcel of real estate, by Theophilus Short, on which contract there was unpaid about \$700; all of which property went into the possession of the widow, under an agreement between her and the plaintiffs, whereby, in consideration thereof, she agreed to pay all the debts of the testator, including the balance owing on the land contract. The widow paid all the debts; the payments made on the land contract were made with money furnished by her; and some of the money arose from the rents of the

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real estate embraced in the contract. This action was brought by the plaintiffs as surviving executors of Consider Lucas, to have a sale of the said real estate; for a construction of the will; and for directions as to the disposition of the proceeds of the sale. Some of the defendants answered; and the action was referred to a referee, before whom it was tried. The referee reported that the trustees of the First Baptist Society of Canandaigua was an unincorporated religious association; that the Baptist Missionary Convention of the State of New York was an incorporated religious association, having no right by its charter to take by devise; that the general convention of the Baptist denomination, in the United States, &c. was incorporated under the laws of Pennsylvania, and authorized by its charter to take real estate by devise; and he adjudged that the first named society was entitled to one-fourth of the said real estate; the last named association to one-half; and the heirs at law of the testator to the remaining fourth. Costs were allowed to the plaintiffs, and also to the defendants, and a sale of the premises was directed. At this stage of the action the appellant Beeman was admitted a party defendant, who answered, setting up a claim that the estate of the widow be reimbursed what she had paid out of her own means and beyond her proper proportion to pay; and the case was recommitted to the referee for further hearing and decision. The referee rejected the claim, and judgment was rendered in accordance with the first report; and several exceptions were taken by the appellant.

T. R. Strong, for the appellant. I. The testator, Consider Lucas, was in equity the owner of the land under the land contract, subject to a lien of the vendor or his representatives for the unpaid purchase money. Had he died intestate, the land would have descended to his heirs with the lien upon it. By the will it passed to Mrs. Lucas, to whom it was devised for life, subject to the lien. (*Johnson v. Corbett*, 11 Paige,

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265. *Champion v. Brown*, 6 *John. Ch.* 398. *Livingston v. Newkirk*, 3 *id.* 312.)

II. Mrs. Lucas, as between her and the owners of the land subject to her life estate, was bound to keep down the interest on the sum unpaid on the contract, during her life, but was not bound to pay any of the principal. (4 *Kent's Com.* 74. *Bell v. The Mayor &c.*, 10 *Paige*, 71.)

III. The land contract was in the nature of a mortgage on the lands, and there being no express direction in the will that the amount owing be otherwise paid, the devisees and heirs were bound to pay the same, in the proportion of their interests, under the provisions of the statutes. (1 *R. S.* 749, § 4. *Halsey v. Reed*, 9 *Paige*, 446, 454.) The application of this statute to cases of land held by contract, descended or devised, does not seem to have been considered in some of the cases.

IV. If the last preceding point be not tenable, then it is submitted that, by the will of the testator, the personal and real estate was made a *common fund* for the payment of the debts and funeral expenses—the land being equally liable with the personal property. By the first item of the will these debts and expenses were to be paid in preference to any “*devise or legacy.*” Then, after two small bequests of \$50 and \$25, by the fourth item of the will, was given to the widow the use of the residue of all the “*personal and real estate and property.*” The gift to the societies, at the death of the widow, is of what “*the personal and real estate and property shall then be worth.*” (*Lewis v. Darling*, 16 *How. U. S. Rep.* 1. *Tracy v. Tracy*, 15 *Barb.* 503. *Reynolds v. Reynolds' Ex'rs*, 16 *N. Y. Rep.* 257.)

V. The personal property and a portion of the rents having, as found by the referee, been applied to pay the principal of the debts and expenses of the testator, including the debts for the land, to the extent the widow thereby parted with the use of the property beyond her legal obligation to do so, she was subrogated to the rights of the creditor on the

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land contract, and had a lien on the land for her reimbursement. (4 *Kent's Com.* 74. *Smith v. Wyckoff*, 11 *Paige*, 49. *Wilkes v. Harper*, 2 *Barb. Ch.* 338. *Mathews v. Aikin*, 1 *Comst.* 595.) In *Bisset*, on estates for life, it is said (p. 209,) "When a tenant for life pays off a charge upon the estate, this act will, *prima facie*, and without any thing being said about it on either side, be intended to make him a creditor, and the charge will continue for the benefit of his personal representatives." (See also 273; *Countess of Shrewsbury v. Earl of Shrewsbury*, 1 *Vesey, jun.* 227.) This debt to the widow and lien therefor passed to her representatives as part of her personal estate. (*Mollan v. Griffith*, 3 *Paige*, 402, and cases there cited.)

VI. Especially as between the widow and the heirs taking the real estate by descent, she had a lien on the land to the extent she applied her interest in the personal property, to pay the principal of debts. (*Mollan v. Griffith*, 3 *Paige*, 402.) All the devises to the societies were void.

VII. Certainly to the extent the rents of the land were appropriated, by the widow to pay debts, she was subrogated to the lien of the creditor in the land contract, which passed to her administrator. The report of the referee shows that a part of the rents was used to pay the land debts.

VIII. The agreement between the widow and her associate administrators, mentioned in the report of the referee, was a *nudum pactum* and void; but if otherwise, it did not affect the question of her right to subrogation and a lien as aforesaid.

IX. The judgment for a sale of the land is without authority and void; and the several exceptions to the report of the referee are well taken.

E. A. Hopkins, for the respondents. I. The referee did not err in deciding that the personal estate of the testator was the primary fund for the payment of the debt to Theophilus Short. The testator in his will, specifically directing all

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the debts to be paid, included, and intended to include, the debt to Short, and appointing executors to execute the will containing such a direction, was exactly tantamount to directing the executors to pay the debt to Short; and hence, under the will, the debt to Short was a debt for the executors to pay, and not for the heirs or devisees. In 2 *R. S.* 156, § 4, 4th ed., the phrase “unless there be an express direction in the will of the testator that such mortgage be otherwise paid,” signifies *otherwise than by the heir or devisee*. This will does direct the debt to Short to be otherwise paid. It requires it to be paid before the heirs or the devisees take any thing, and that they take only the residue. Hence, even if the debt to Short were in fact a mortgage within the meaning of the statute, (which it is not,) it would not, under this will, be primarily chargeable on the heirs or devisees. (3 *Paige*, 403, 405.) Being payable by the executors, it was to be paid out of the personal property. (2 *R. S.* 272, 273, §§ 27, 28, 4th ed. *Id.* 285, §§ 1, 2.)

II. If the real estate were the primary fund for the payment of the debt to Short, that fact could legally afford no relief to Beeman as administrator of the widow. As to the real and the personal estate, whichever was the primary fund for the payment of the debt to Short, certain it is, under this will, that it was to be paid before anybody should take any thing, either as heir, or devisee, or legatee. By the terms of the will, nobody was to take any thing till the debts should be paid, and then, only the residue. In this view, the executors under the order of the surrogate should pay the debt to Short by leasing the property, if in that way the debt could be paid, as it clearly could. When the use of the real estate had thus paid this prior lien, then, and not till then, the widow's right of use for life as devisee would attach. We had no right to it till the widow should have done using it; so she had no right to it till the prior lien was paid. After that lien should be paid, she was devisee of the use of what was left for life, and we of the remainder. As

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to the residue of personal and real estate, she was both the legatee and devisee of the use for life; we were both legatees and devisees of what was left. She might spend of it more or less; that was our ill fortune or good fortune, as the case might be. Her good husbandry of the property, real or personal, could give to her heirs, at her death, no right to the property.

III. The referee did not err in deciding that the agreement between the plaintiffs and the widow was a valid agreement. It was certainly a valid agreement if the debt to Theophilus Short was, under the will, chargeable primarily on the personal estate of Consider Lucas. But if that debt was to be paid out of the real estate, still it was, under the will, to be paid by the executors; hence this agreement between the co-executors, by which she, one of them, was to pay this debt, was a valid agreement. Or, if it was a question between the co-executors, the plaintiffs and herself, whether that debt should be paid out of the personal estate or out of the real estate, yet it was competent for them to settle that question by such an agreement; and so the agreement is a valid adjustment of the question.

IV. Section 4 of the title, "Miscellaneous provisions of a general nature," (2 *R. S.* 156, 4th ed.) relates to a proper mortgage, in form and in fact, not to liens like the one in question. This debt to Short was a lien on the land, and so far it partook of the nature of a mortgage; but it was not a mortgage in fact, nor even in effect. A judgment in a court of record, docketed in the county, is a lien on land, and so far partakes of the nature of a mortgage; yet it is not a mortgage in fact, nor even in effect.

V. Since the personal property was sufficient to pay all the legacies and all the debts, including the debt to Short, such payment of all could furnish no cause for controversy between legatees and devisees, or between executors and heirs or otherwise. The personal property was clearly sufficient to pay not only all the legacies, but all the debts. It is only

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where the personal property is insufficient to pay all the legacies and all the debts that a legatee may be subrogated to a creditor having a lien on the real estate of the decedent, when such creditor has been paid out of the personal estate. There being sufficient personal property to pay all the legacies and all the debts, including those that are liens on the real estate of the decedent, the devisees or heirs cannot complain that those liens are paid by the executors, and the legatees cannot complain, for they have received their legacies.

VI. The widow had, under her contract with her co-executors, so treated the estate as to make it impossible for her representatives to show what portion of the debt to Short was paid out of the personal property or out of the rents of the real estate, or when the same was paid. She is dead. Her co-executors only knew that she paid some portion of the debt to Short out of the rents of the real estate, but what portion they did not know; what portion the referee cannot and does not state, nor can he nor does he state the time.

VII. If the will had not specifically directed the payment of all the testator's debts in the first instance, even then, such are its remaining terms, that the payment of the debt to Short, as made by the widow, gave neither her nor her administrator any claim on the estate. In that case, suppose she was bound for her life to keep down the interest on' the debt to Short, and suppose this is all she had done during her life, then she would have left to the subsequent legatees and devisees so much the greater remainder. She paid from the estate for which she had the use for life, and the successful defendants had the remainder. So far as she took of the estate or its use to pay the principal of the debt to Short, so far she diminished that remainder. So far as she took of the rent of the real estate to pay upon that debt, instead of living upon such rent, so far she had to draw further on the personal estate for her use and support. While she was legatee and devisee of the use of the estate for her life, she was both by the terms of the will and of her agreement with her

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co-executors, a trustee of the remainder, and the successful defendants were the "*cestuis que trust.*" Hence, while she had the right of use for her support during her life, she was bound, subject, to that use, to husband and preserve the estate for her *cestuis que trust*. So far as she took of the rents of the real estate to pay off the debt to Short, so far she diminished that source of her support, as provided by the will. And just so much further she must needs draw on the personal property for her support; and to the same extent she diminished the remainder. Her paying to Short by such means was of no benefit to the remaindermen. Had that debt remained unpaid by her, that remainder had been just so much larger. This point supposes she was not bound to pay that debt, but that it belonged to the remaindermen to pay. She could not take of the use of the estate provided by the will for her support and pay this debt with it, then draw upon the principal of the estate so much the more for her support, and then treat that debt as if she had paid it properly out of her own separate independent estate. Trustee as she was, in her character as executrix; trustee as she was, by the express terms of the will; trustee as she was, by her agreement with her co-executors, if she had so designed or so attempted, she had been guilty of a gross attempt to violate her trust duty.

By the Court, JOHNSON, J. This case, so far as the defendant Beeman is concerned, must turn wholly, I think, upon the question whether it is incumbent upon the executor, or the devisee, to pay the purchase money remaining unpaid upon lands purchased by the testator and held by him by contract at the time of his death. It has been repeatedly, and I believe uniformly, held that the heir or devisee could compel the executors or administrators to pay off such a debt, for his benefit, out of the assets in the hands of the latter. (*Dart on Vend. and Purch.* 125. *Broome v. Monck*, 10 *Vesey*, 597. *Livingston v. Newkirk*, 3 *John. Ch.*

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312. *Cogswell v. Cogswell*, 2 *Edw.* 231. *Johnson v. Corbett*, 11 *Paige*, 265.) The rule was the same in respect to lands incumbered by mortgage. But in regard to mortgages the rule has been changed by our statute, and the mortgage made a charge upon the land exclusively, to be paid by the heir or devisee, unless there be an express direction to the contrary in the will. (1 *R. S.* 749, § 4.)

It is argued on the part of the defendant that the contract debt, for the purchase money, is in the nature of a mortgage, and comes within the spirit and meaning of the statute. But whatever resemblance it may bear in equity to a mortgage, it is certainly not a mortgage within the intent and meaning of the statute; and the provision of the statute is confined exclusively to lands descending, or passing by devise, subject to a mortgage "*executed* by any ancestor or testator." It refers to no other charge or incumbrance whatever, legal or equitable. In all other respects the rule remains as it was before.

It is entirely clear that this debt for the land was not by the will charged upon the real estate. The language of the will is clear and explicit. "All debts which I shall justly owe shall be paid in preference to any devise or legacy herein contained."

There is no doubt that the personal estate was abundantly sufficient for the payment of all the debts of the testator, including this debt for the land. And it can make no difference, in this case, that the life tenant used a small portion of the rents to pay that debt. She had the whole personal estate in her own charge and right, and it is not shown, or pretended, that it was insufficient, had it been so applied, to pay and satisfy all the debts of the testator.

But, had this been expressly shown, I do not see what claim her administrators could have. She agreed expressly to pay all the debts, if her co-executors would give up the whole estate to her. To this they assented, and she took the assets, and paid the debts, according to her agreement.

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It is suggested, rather than claimed, that this agreement was not binding upon her. I do not see why it was not. It was founded in a good consideration, as between her and her associates, who were acting for the interests of all having any claims upon the estate. At all events, the agreement was fully executed, on her part, and I do not see how her representative can now gainsay it, or claim any thing from it, as against any other person interested in the remainder.

The case was properly disposed of by the referee, and the judgment must be affirmed, with costs against the appellant.

[MONROE GENERAL TERM, September 2, 1861. *Smith, Knox and Johnson*, Justices.]

BRADY vs. THE LITTLE MIAMI RAIL ROAD COMPANY.

The neglect to present a draft payable on demand, for four days, during which time the drawee fails, will discharge the drawer.

Where a person residing in New York, and acting as the authorized agent of another, requested a friend at Cincinnati to collect from a corporation there the amount of a dividend due to his principal, upon stock, and to transmit to him a draft for the amount; *Held* that if the agent left New York while expecting the draft, it was his duty to leave authority, with some one, to present the draft, when received.

And that for the negligence of the agent in not presenting such draft for payment within the proper time, the principal was responsible.

THIS was an action upon a draft drawn by the defendant, at Cincinnati, upon the Ohio Life Insurance and Trust Company, New York, for \$250, payable to Henry A. Hurlbut or order, and dated August 17, 1857. The draft was given in payment of a dividend upon stock in the defendant's company, owned by William V. Brady. Brady being absent in Europe, sent a written authority to Hurlbut to receive the dividend. The latter employed one Reeves, at Cincinnati, to collect the dividend and forward the money to him, at New York. Reeves accordingly procured the draft in question

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from the defendant and enclosed the same to Hurlbut, at New York, in a letter dated Cincinnati, August 17. The check reached New York and was duly delivered at the place of business of said Hurlbut, in New York, on the morning of the 20th day of August, 1857, to some person in charge thereof. Hurlbut was on said 17th day of August, 1857, and ever since has been, one of the firm of Swift, Hurlbut & Co. of the city of New York, who were then doing business at No. 207 Pearl street. On said 20th day of August, and up to the 25th thereof, the said Hurlbut was absent from the city of New York, and the letter enclosing said draft remained unopened on Hurlbut's private desk till said 25th day of August. The check was not presented for payment to the drawee thereof, to wit, The Ohio Life Insurance and Trust Company in New York, at their place of business in the city of New York, till the 25th day of August, 1857, upon the return of said Hurlbut to the city. All checks, drafts, bills of exchange, &c., drawn on the said Ohio Life Insurance and Trust Company, and presented on or before one o'clock on the 24th day of August, 1857, were duly paid at presentment, and the check on which this action is brought would also have been paid by the said company, had the same been presented for payment at any time on or before one o'clock on the 24th day of August, 1857, when the company stopped payment. The defendant had at the time of the drawing of said check, and also at the time of the failure of said Ohio Life Insurance and Trust Company, ample funds to pay said check to its credit in the hands of said Trust Company in the city of New York.

The defendant, by its answer, insisted that the draft was not presented for payment to the drawees thereof within a reasonable time after its delivery to the plaintiff's agent, nor until after the drawees had stopped payment and become insolvent; that the plaintiff or his agent or agents were guilty of gross laches in not presenting said draft to the drawees for payment, and that by reason of such laches said draft was

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not paid. That the said Ohio Life Insurance and Trust Company, at the time of the drawing of said draft and ever since, has been largely indebted to the defendant, and that had said draft been presented to said company at New York for payment within a reasonable time after its delivery to the agent of the plaintiff, as above set forth, it would have been paid. That the defendant had been damaged to the amount of \$250 and upwards by the laches and negligence of the plaintiff, his agent or agents, in not duly presenting said draft for payment. And the defendant would insist upon the trial, that by reason of such negligence and laches of the plaintiff, his agent or agents, the defendant, was discharged of and from all liability upon said draft.

The referee to whom the action was referred was of the opinion that the plaintiff had, through the neglect of his agent, failed to collect from the Ohio Life and Trust Company the funds which the defendant had placed there to meet the draft, and that the defendant should not be compelled to pay the amount a second time. He therefore reported in favor of the defendant, for the costs of suit. And a judgment being entered accordingly, the plaintiff appealed.

Wm. H. Scott, for the appellant.

F. A. Lane and *F. F. Marbury*, for the respondent.

By the Court, INGRAHAM, J. The principal was responsible for any negligence of the agent in the ordinary discharge of his agency.

The agent having authorized and requested Mr. Reeves to collect from the company, and transmit a draft for the dividend, which was done by Reeves in a check from the defendant on the Ohio Life Insurance and Trust Company, was bound, if he left the city, to leave authority with some one to present the check, when received.

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The neglect to present a draft payable on demand, for four days, during which time the drawee failed, discharged the drawer, and the finding of the referee cannot be disturbed.

The judgment is affirmed, with costs.

[NEW YORK GENERAL TERM, May 6, 1861. *Clerke, Gould and Ingraham, Justices.*]

 DEVLIN vs. WOODGATE.

The defendant having employed one C. to excavate a vault, in front of his house, C. hired the plaintiff to do the work. The plaintiff commenced the job, and after working one day, he went to the defendant and declined going on with the job, unless the latter would promise to pay him. The defendant told him to go on and finish the job, and "he should be paid." Held, that the promise was an original and not a collateral undertaking, and was not void by the statute of frauds, but was valid and binding; it not being a promise to answer for the debt or default of C. the contractor, but an absolute promise to pay the plaintiff for a job of work done and to be done, on the premises of the defendant and for his benefit. INGRAHAM, J. dissented.

THIS was an appeal from a judgment entered upon the verdict of a jury, after a trial at the circuit, in an action for work and labor. The jury found in favor of the plaintiff, and the defendant appealed.

WELLES, J. The plaintiff's evidence tended to show that on the second day after he commenced working for Cavenagh, he refused to continue the work for him, or at all, except upon the faith of the promise of the defendant to pay him for it. The plaintiff swears on his direct examination, that the defendant told him to go on with the work, and that he should be paid. He says, also, that Cavenagh was the contractor, but that he did not like to go on for him, and refused to go on till defendant promised to pay him. It does not appear what the plaintiff's contract with Cavenagh was,

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except that he commenced the work in question under a bargain with Cavenagh. The reason why he refused to go on and do the work under that bargain, appears to have been that he had become satisfied that he should not get his pay from Cavenagh. Whether the plaintiff was bound by his contract with Cavenagh to do any particular amount of work for him does not appear; and if it did appear that he was under a legal obligation to Cavenagh, I do not perceive how it could affect the question between these parties. If he, the plaintiff, had violated his contract with Cavenagh, and with or without sufficient cause had refused to go on with the work for him, it was entirely competent for him to enter into a contract with the defendant to do the same work which he had contracted with Cavenagh to perform; and if the defendant, under such circumstances, requested him to perform the services, and promised to pay him, it was an original and not a collateral undertaking, and the defendant would be liable to him for the work done under such contract. The work was done on the defendant's premises, and it is fair to presume it was for his benefit. There is nothing in the plaintiff's evidence adverse to this view, excepting that the plaintiff afterwards signed and made oath to an account for this work against the defendant, under the advice of counsel, with a view of making the defendant's property liable under the mechanics' lien law. This was not an estoppel *in pais*. It was at most matter of evidence for the consideration of the jury, upon the question whether the defendant was originally liable. The defendant explains how he came to make out and swear to the account against Cavenagh, and the explanation which he gives tends to relieve the act of any unfavorable influence upon his claim upon the defendant.

The defendant was a witness in his own behalf, and positively denied that he employed the plaintiff to do the work in question, or promised to pay him for it. The question was therefore eminently one for the jury, who, it seems, have given credence to the plaintiff's testimony and disbelieved the

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defendant. No complaint is made of any error in the judge's charge to the jury.

I am therefore of the opinion that the evidence would warrant the jury in taking the view above suggested in favor of the plaintiff; in which case the defendant's promise was not within the statute of frauds requiring certain agreements to be in writing, and that the judgment and orders appealed from should be affirmed.

SUTHERLAND, J. Whether the defendant told the plaintiff to go on and finish the work and he should be paid, as the plaintiff testified, was a question of fact, which appears to have been fairly submitted to the jury; and we must assume from their verdict, that they gave credit to the plaintiff and not to the defendant; and that the defendant did so tell the plaintiff, and that he, as he substantially testified, would not have gone on with the work had not the defendant promised to pay him, or see him paid.

The question in the case, then, is the question of law, whether this promise not being in writing was void by the statute of frauds? I think the promise was not within the statute, and was valid. It was not a promise to answer for the debt or default of Cavenagh, the contractor, but an absolute promise to pay the plaintiff for a job of work just commenced and to be finished on the premises of the defendant, and *for his benefit*.

The job of work was the excavation of a vault in front of the defendant's house. The plaintiff had been employed by Cavenagh, the contractor with the defendant, to do it. It must be assumed from the case, that the plaintiff was to be paid for the job when the work was finished. The plaintiff commenced and worked one day. Not being willing to trust Cavenagh, the day after, he goes to the defendant and declines going on with the job unless the defendant will promise to pay him; and the defendant tells him to go on and finish the job, and "he should be paid." This is, I think,

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a fair statement of the case, which presents the question of law.

As it must be assumed that by the agreement between the plaintiff and Cavenagh the plaintiff was to be paid for the work as one job when it was finished, Cavenagh was not indebted to the plaintiff even for the one day's work performed when the defendant made his promise to the plaintiff. If the plaintiff, without reasonable excuse, had then abandoned the job, he could not have recovered of Cavenagh for the one day's work. The defendant's promise then was not a promise to answer for the *debt* of another, even as to the one day's work performed. For the work to be performed, of course no *debt* existed when the defendant made his promise. The question then is, was the defendant's promise a promise to answer for any default of Cavenagh in not paying the plaintiff, or was it an absolute promise to pay the plaintiff, or to see that he was paid? The work was for *the benefit of the defendant*. The money for the work was to be paid by the defendant, either to Cavenagh or to the plaintiff. Did the defendant intend to pay over the money to Cavenagh, and then by his promise undertake that Cavenagh should pay the money to the plaintiff; or did the defendant by his promise undertake to pay the money directly to the plaintiff without its going into Cavenagh's hands? I think the latter, and that the plaintiff had a right to suppose that such was the defendant's intention. I think the plaintiff, from the promise made, under the circumstances, had a right to rely upon the defendant's retaining from the contract price with Cavenagh sufficient to pay him. In my opinion, the promise should be considered an absolute promise to pay the plaintiff, and not a promise that Cavenagh should pay the plaintiff.

I therefore concur in the conclusion to which Judge Welles has arrived.

If A. B., a stranger, having no interest in the work, had promised, under the circumstances, that the plaintiff should

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be paid, it is quite clear to me that the promise would have been within the statute, and void. But here, the work was in fact done for the defendant; and I think the promise should be considered merely a promise to pay for work done and to be done for him, not collateral, but direct and absolute.

INGRAHAM, J. dissented.

Judgment affirmed.

[NEW YORK GENERAL TERM, May 27, 1861. *Ingraham, Welles and Sutherland*, Justices.]

BREHM vs. THE GREAT WESTERN RAILWAY COMPANY.

Although the mere fact that a person is injured, while being transported in a rail road car, does not impose upon the rail road company the burden of disproving negligence, yet the presumption of a want of care may arise from circumstances attending the injury; and whenever such a state of things exists, the onus is upon the company to show that the injury did not result from any negligence on its part.

Accordingly, where a train of cars upon the defendant's road, in which the plaintiff was a passenger, was, in consequence of an embankment having been swept away or submerged, plunged into a gulf of some forty feet in depth, and the plaintiff seriously injured; *Held* that these facts being shown to exist, the presumption of negligence on the part of the defendant necessarily arose; and that it required evidence on the part of the defendant to overcome that presumption and establish affirmatively that no negligence, on its part, existed to which the injury could be attributed. MORGAN, J. dissented.

Held, also, that it was a question for the jury to decide, upon the whole evidence, whether the defendant had succeeded in removing the presumption of negligence arising from the circumstances of the case and establishing, clearly, that the accident arose either from causes inexplicable, and involving no responsibility on its part; or from the hidden forces of nature, and the interposition of a superior power which no care, skill or precaution on its part could avert or control.

That the refusal to charge that if the injury was caused, in part, by an un-

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foreseen cause, and in part by a cause attributable to negligence, the plaintiff could not recover, was not a ground of exception. If there is a proximate and discoverable cause, which may have produced the injury, and which the evidence will warrant the jury in finding was sufficient for that end, it in no respect conduces to the defendant's impunity that another cause existed which was perhaps adequate to the production of the result.

That the judge was not bound to charge that if the defendant employed proper persons to construct and protect the embankment and they were guilty of no negligence in the performance of their duties, the plaintiff could not recover; there being no such ground of exemption, known to the law.

That in refusing to charge that the plaintiff could not recover unless, before the accident, there was some apparent source of danger to the embankment, which it was the duty of the defendant to provide against or remove; and in charging that under such a condition of things the defendant would not be chargeable with negligence, the judge committed no error.

That on the trial of such action the declarations of the engineer of the rail road company, made while actually engaged upon the work, and in respect to its proper construction, were in substance a part of the *res gestæ*, and were therefore admissible in evidence.

Although great respect should be paid to the opinions of scientific witnesses respecting the cause of an accident, yet they are no more *controlling* than are those of any other class or body of men, when speaking upon subjects which lie within the range of common observation and experience.

APPEAL from a judgment entered at a special term upon the verdict of a jury, after a trial at the circuit, and from an order made at a special term denying a motion for a new trial. The action was brought to recover damages sustained by the plaintiff in consequence of an accident occurring upon the railway of the defendant, on which he was a passenger, in March, 1859. The complaint alleged that the defendant had been, and still was, a foreign corporation, doing business, having agents and owning property within this state, under the corporate name of "The Great Western Railway Company," and was and is the owner and proprietor of a certain rail road or railway called The Great Western Railway, constructed and extending across the province of Upper Canada or Canada West, from a point at or near Windsor on the Detroit river, in Canada aforesaid, to a point at or near Niagara city on the Niagara river, in this state, together with the track, rails and other fixtures, locomotives, carriages and

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other appurtenances and property belonging and pertaining thereto ; and was and is using the same in conveying passengers between the points aforesaid, for hire and reward. That being such owner and proprietor of the same, and using the same for the purposes aforesaid, the defendant, on or about the 19th day of March, 1859, at Windsor aforesaid, received the plaintiff as a passenger on board one of said carriages, being one of a train of said carriages, drawn by one of said locomotives, propelled by the use and power of steam, to be by the defendant carried therein over said railway upon a certain journey, and between the points aforesaid, for hire and reward to said defendant ; and it thereby then and there became and was the duty of the defendant to have and keep the said railway, its fixtures, appurtenances and property aforesaid, in good repair and condition, and to run said locomotive, and to draw said train and carriage with care and skill, and to carry the plaintiff in said carriage on said journey safely. Yet the defendant, not regarding its duty in that behalf, did not use due and proper care and skill, neither in constructing or keeping said railway in a proper manner and in good order and repair, nor in keeping said railway, its appurtenances and fixtures secure or in good order and condition, nor in running said locomotive or running said train or carriage, wherein the plaintiff was a passenger. But on the contrary the defendant, its agents and servants so carelessly, negligently and unskillfully constructed and managed said railway, its fixtures, appurtenances and the property aforesaid, and the locomotive, train and carriage aforesaid, that on the day and year aforesaid, to wit, at or near Dundas, in Canada aforesaid, by and through the carelessness, negligence, unskillfulness and improper conduct of said defendant, its agents and servants in that behalf, said railway, fixtures, appurtenances and property became and were left out of repair, the track and rails thereof removed and out of place, and said locomotive, train and carriage were violently precipitated into a gulf or opening across said track, and was sud-

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denly and violently stopped, crushed and jammed together ; and said plaintiff sitting, being and being carried in said carriage as aforesaid, was thereby then and there suddenly and violently thrown from his seat and jammed against and crushed between and among the sides, seats and fixtures and fragments of said train and said carriage, whereby the plaintiff's foot was jammed, his leg badly bruised, his head badly cut, and his chest crushed, the bone thereof was fractured, his arm and face badly crushed and bruised, and his lungs and other vitals and other parts of his body badly and permanently injured, and the plaintiff put in imminent danger of his life, and delayed upon his said journey and exposed to the inclement weather ; and he was and is otherwise hurt, bruised, wounded, crippled and injured, insomuch that he thereby became and was and from thence hitherto has been and still is sick, sore, lame, crippled and disordered, and has from thence hitherto suffered and underwent great pain, and has thence hitherto been confined and unable to attend to his ordinary business ; and has thence hitherto been obliged to and has necessarily expended large sums of money and incurred large debts for necessary surgical and medical aid and attendance, and for nursing and other assistance. And has sustained damages by reason of the premises to the amount of \$10,000. And he demanded judgment against the defendant for that sum and costs of the action.

The answer was a general denial of the matters stated in the complaint. The action was tried at the Onondaga circuit in September, 1860, before Justice MULLIN and a jury. The material facts appearing at the trial, in relation to the nature and causes of the accident, &c. are sufficiently set forth in the opinion of the court. The plaintiff was examined as a witness, and he and other witnesses testified to the extent and severity of the injuries received by him.

Charles R. Babbitt, a witness for the plaintiff, testified as follows : "I reside at Rochester ; I am an engineer, have been eighteen years ; I was employed as resident engineer

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during the construction of defendant's rail road from three miles west of Hamilton to the Grand river, and on this section ; went into the company's employ in 1847 ; and was in their employ again from 1850 to 1854. When I first went on to the road Mr. Stuart was chief engineer ; Mr. Benedict was chief engineer from the fall of 1850 to the fall of 1852. John T. Clark was Benedict's successor ; and Mr. Clark and I left about the same time, in the summer of 1854. I aided in making the embankment in question ; it was commenced under Benedict and finished under Clark. A tressle work was first raised, over which the cars ran ; think we commenced filling in the soil before Benedict left. The culverts were first located by George Cole, resident engineer ; he located three, the east and west one in the neighborhood of the break." The plaintiff's counsel then asked the witness the following questions : " What did Mr. Benedict say about the culvert ? " To this question the defendant's counsel objected, upon the ground that the question was incompetent, and called for hearsay, incompetent and irrelevant testimony ; but the court overruled the objection and admitted the testimony, and the defendant's counsel excepted. The witness in answer to the question said : " Benedict told me to omit the third culvert, on the ground that the water could be carried to the east culvert by a ditch ; he said a ditch should be cut through a spur of the mountain. The location of the middle culvert was put just west of the spur. The ditch was not made while I was there."

The plaintiff offered to show that since the accident the defendant had made a ditch to carry the water to the east culvert. Objected to by the defendant's counsel as immaterial. Objection overruled, and the defendant's counsel excepted, and the witness testified.

The proofs being closed, the defendant's counsel moved for a nonsuit upon the whole evidence, upon the ground that no cause of action had been established, and particularly that there was no sufficient evidence to go to the jury that the

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accident was the result of any neglect on the part of the defendant. But the court denied the motion, and the defendant's counsel excepted. The cause was then submitted to the jury by counsel for the respective parties. The court charged the jury, among other things, that the plaintiff could not recover, unless the jury found that his injuries were caused by some negligence of the defendant; but if the injuries were produced by the defendant's running its train into a breach in its road, where an embankment belonging to the defendant's road had given way, these facts, standing alone and unexplained, would be *prima facie* evidence of such negligence. To this charge the defendant's counsel excepted. The court further charged the jury that the building of a new ditch by the defendant, since the accident, was a circumstance which the jury might take into account in determining the question, whether the water standing on the side of the bank had any agency in producing the accident to the bank. But the construction of the ditch was only evidence of the opinion of the officers of the company as to the water standing upon the bank being the cause of the slide, and the weight to be given to it would be controlled by the other evidence in the cause. To this charge, and to each proposition thereof, the defendant's counsel excepted. The counsel for the defendant then requested the court to charge the jury, that if there was an extraordinary and unprecedented storm, which could not be foreseen, and if this in part produced the accident, aided by a cause which could have been foreseen and prevented, but which alone could not produce the accident, then the plaintiff could not recover. The court refused so to charge, and the defendant's counsel excepted. The counsel for the defendant then requested the court to charge the jury, that the construction of the ditch on the north side of the bank, after the accident, was not an admission by the company that at the time of the accident a ditch was necessary to protect the bank from the water lying against it, nor does it bear upon that fact. The court

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refused so to charge, and the defendant's counsel excepted. The counsel for the defendant then requested the court to charge that, upon the whole evidence, it was not affirmatively proved what was the approximate cause of the sliding of the bank, and therefore the plaintiff could not recover. Refused, and exception by the defendant's counsel. That, upon the whole evidence, it was not affirmatively proved that the sliding of the embankment was owing to any negligence of the defendant, and therefore the plaintiff was not entitled to recover. Refused, and exception by the defendant's counsel. That although the accident may have revealed the fact that there was, before it occurred, a source of danger to the embankment, there was not proof sufficient to show that prior to the accident there was any apparent source of danger to the embankment, which it was the duty of the defendant to provide against or remove. Refused, and exception by the defendant's counsel. That the proof showed that this accident was the result, not of causes within the ordinary experience of mankind in the region where it occurred, but of an extraordinary storm, a convulsion of nature, such as could not rationally be expected to have been foreseen or provided against, and therefore the plaintiff could not recover. Refused, and exception by the defendant's counsel. The defendant's counsel then requested the court to charge the jury that the plaintiff could not recover, unless he had proved affirmatively what was the proximate cause of the giving away of the embankment. But the court refused so to charge, unless modified by adding to said proposition, that if the accident was caused by the giving away of the bank, that was *prima facie* evidence of negligence. And the court charged the proposition as modified. To which refusal and charge, and each of them, the defendant's counsel excepted. Also to charge that the plaintiff could not recover, unless he proved affirmatively that the accident was owing to some neglect of the defendant. The court refused so to charge, unless modified according to the last proposition; and the

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defendant's counsel excepted. Also to charge that the occurrence of the accident afforded no presumption of negligence. The court refused so to charge, and the defendant's counsel excepted. Also to charge that the plaintiff could not recover, unless he showed in what the negligence consisted. But the court refused so to charge, and the defendant's counsel excepted. Also to charge that the plaintiff could not recover if the jury differed as to the cause of the accident, or the character of the neglect. But the court refused so to charge, unless modified by adding: If the jury cannot agree that the defendant was guilty of some act of negligence, they cannot find for the plaintiff; and the defendant's counsel excepted. That the plaintiff could not recover, unless the jury could all agree in attributing the accident to the same cause or causes, and the same neglect. But the court refused so to charge, and the defendant's counsel excepted. Also to charge that the plaintiff could not recover, unless before the accident there was some apparent source of danger to the embankment, which it was the duty of the defendant to provide against or remove. But the court refused so to charge, unless modified by striking out the words "the plaintiff cannot recover," and substituting the words "the defendant is not chargeable with neglect," and charged the jury according to the proposition as modified. To which refusal and charge, and each of them, the defendant's counsel excepted. Also that the plaintiff could not recover, unless before the accident there was some apparent subsisting cause, sufficient to produce the accident, which it was the duty of the defendant to provide against or remove. But the court refused so to charge, except by modifying the proposition the same as the last one, and charged as so modified; and the defendant's counsel excepted. The defendant's counsel also requested the court to charge the jury, that even if the jury should find that a pool of water had collected above the embankment, and that the slide was occasioned by it, and that therefore, since the accident, it would be negligent to suffer

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a similar pool to lie against the bank, yet, if prior to the accident it was not known that such a cause could produce such an effect, the plaintiff could not recover. The court refused so to charge, unless modified in the same manner as in the last two propositions, and charged as modified; and the defendant's counsel excepted. Also to charge that if there was a reasonable doubt remaining in the minds of the jury as to the cause of the accident, or as to its having been the result of the negligence of the company, the plaintiff could not recover. Refused by the court, and exception by the defendant's counsel. Also to charge that the question, what caused this accident, was under all the circumstances of the case a question of science; and if the jury believed the testimony of the scientific witnesses, who stated that the cause of the accident could not be known with certainty, and that the cause thereof was doubtful, the plaintiff could not recover. But the court refused so to charge, and the defendant's counsel excepted. Also to charge that the question, what caused the slide, was a question of science; and if the jury believed the testimony of the scientific witnesses, who stated that the accident could not have been caused by the action of the pool upon the embankment, the plaintiff could not recover. Refused, and exception by the defendant's counsel. Also to charge that if the jury believed that it was rational to suppose that the accident might have been the result of any other cause than the pool soaking into and carrying away the embankment, then the plaintiff could not recover. Refused, and exception by the defendant's counsel. Also to charge that the question, what caused this slide, was a question of science; and if the jury believed the scientific witnesses, who stated that under all the conditions proved to have existed at the time, they would not have apprehended danger to the embankment, the plaintiff was not entitled to recover. Refused, and exception. The defendant's counsel then requested the court to charge the jury, that if the defendant employed proper persons to construct and protect the embankment, and

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they were guilty of no negligence in the performance of their duties, the plaintiff could not recover. But the court refused so to charge, and the defendant's counsel excepted. The defendant's counsel then requested the court to charge the jury that, though under ordinary circumstances, and in cases of ordinary embankments, the action of water upon them is a matter within the observation and knowledge of many practical men; yet, considering the extraordinary size and character of this embankment, and other circumstances of the case, the question, what caused this accident, and whether it was occasioned by the negligence of the defendant, must be far better understood by scientific witnesses, and the jury should give a controlling influence to their opinion in coming to a conclusion. But the court refused so to charge, unless modified by striking out the word "controlling," and in that form charged the proposition; to which refusal and charge, and each of them, the defendant's counsel excepted. The defendant's counsel then requested the court to charge the jury, that it was affirmatively shown that this bank was properly constructed, and of proper materials; also that there was no apparent cause of danger, which it was the duty of the company to prevent; also that even now the most competent engineers did not know the cause of the accident, or how to provide against it, and consequently the plaintiff could not recover. But the court refused so to charge, and the defendant's counsel excepted. The jury, thereupon, found a verdict in favor of the plaintiff for \$5000.

It was conceded, for the purposes of the application for a new trial, and of any appeal in this cause, that the plaintiff sustained the injuries as charged in the complaint, and that the damages were not excessive. The defendant appealed.

E. C. Sprague, for the appellant.

D. Coates, for the respondent.

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BACON, P. J. It will enable us better to appreciate the exceptions taken to the charge and refusal to charge by the justice who tried this cause, if we disembarrass the case of all questions excepting the one on which the cause really turned, and which necessarily controlled the verdict. By doing so, we shall see that there was in truth but one point upon which all the material testimony converged, and that if the charge in its leading and vital principle was right, the verdict can be sustained, and the minor and merely subsidiary exceptions will easily resolve themselves, and are indeed worthy of no special consideration. There is no dispute, in the first place, that the plaintiff was a passenger in the cars of the defendant, having duly paid his fare, and entitled himself to be safely transported on their rail road route upon the occasion in question. There is no dispute as to the fact that by the casualty that occurred at the point where the train plunged into the vortex made by the giving way of the embankment and the destruction of the track, the plaintiff was most seriously and permanently injured; and no question is made that the damages awarded by the jury, in case the cause of action is sustained, are excessive.

In addition to this, the case involves no inquiry in respect to any imputed negligence on the part of the plaintiff, by which the injury was caused, or which contributed to the injury; nor is any complaint made that the train was run at an improper rate of speed, or in an imprudent and reckless manner, while passing the point where the accident occurred. The allegations of the complaint are somewhat general and vague, and impute negligence to the defendant in respect to the management of its railway, its fixtures, appurtenances and property, by which they were left out of repair, and the track and rails out of place, and thereby the train being precipitated into a deep gulf the plaintiff was crushed, bruised and wounded, and thus suffered the injuries complained of. As disclosed by the testimony, the precise gravamen of the complaint is, that by the careless and negligent construction

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of the embankment upon the defendant's railway, the want of sufficient culverts and ditches to carry off the water to which it was exposed from its peculiar position, and especially by suffering the water to accumulate above and rest upon and against the embankment and permeating and saturating the bank, it gave way, and carrying off both embankment and track, occasioned the disaster by which the plaintiff suffered, and for which the action was brought. This is the precise point upon the solution of which the question of the defendant's liability depends.

It is only necessary to state that about one o'clock on the morning of the 19th of March, 1859, the train of the defendant coming east, on the route from the city of Hamilton, was suddenly precipitated into a breach in the road made by the giving way of an embankment at a point where a train had passed in safety about two hours previously. There was nothing to indicate danger, or excite alarm, just before the casualty. The breach was about 45 yards in length, and the southerly side was entirely gone. The embankment was made against the face of a mountain, the upper or northern side being about 25, and the lower about 60 feet above the natural level. There was one large culvert under the track, about 150 yards east of the spot where the embankment gave way, and another of equal capacity a considerable distance west of it, and about the center a sort of blind drain had been originally laid, but which as it appeared at the time had been substantially filled up and obstructed. Near the breach there was a hollow, which collected and retained water, which lay against the bank, of the average depth of about 2 or 2½ feet, and as described by some of the witnesses, some 50 feet in length by 10 or 12 in width. A heavy and tempestuous rain storm had prevailed from about 6 o'clock in the evening before, and the weather had been wet for some days previously, and the frost was beginning to come out of the ground.

At the close of the whole testimony, the defendant's coun-

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sel moved for a nonsuit, upon the ground that no cause of action had been established, and no sufficient evidence had been given that the accident was the result of any negligence on the part of the defendant. The motion was denied, and the cause was then submitted to the jury, and the first proposition propounded to them by the court was, that the plaintiff could not recover unless the jury found that his injuries were caused by some negligence of the defendant; but if the injuries were produced by the defendant's running its train into a breach in its road where an embankment belonging to the road had given way, these facts, standing alone and unexplained, would be *prima facie* evidence of such negligence. To this the defendant excepted, and the case, as I view it, turns upon the propriety of this instruction. It is substantially a question upon which party the burden of proof is cast.

It is undoubtedly true that in some of the earlier cases, both in England and in this country, the rule has been stated, in an unqualified form, that in case of alleged injuries by stage coach or rail road casualties, the presumption of negligence arises from the mere fact that an accident has occurred. Such was the case of *Christie v. Griggs*, (2 Camp. 79,) where Sir James Mansfield remarked that the plaintiff had made out his case *prima facie* by proving his going on the coach, the accident, and the damage he had suffered. So in the case of *Stokes v. Saltonstall*, (13 Pet. 181,) the instruction to the jury was that the fact that the coach was upset and the plaintiff injured, was *prima facie* evidence that there was carelessness, or want of skill on the part of the driver, and threw upon the defendant the burden of proof that the accident was not occasioned by the driver's fault, and this instruction was sustained by the court. But in regard to these and the like cases, it is remarked by Judge Selden that the other facts developed in them demonstrated negligence, and that it might well enough have been said that, under the circumstances proved, there was sufficient *prima facie* proof

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of negligence. As an abstract proposition, such a charge, undoubtedly, cannot be sustained.

What then is the proper instruction in a case like this, and how is the proposition to be qualified so as to impose upon the defendant the obligation to disprove negligence, when the burden has been shifted from the shoulders of the plaintiff? As derived from the recent cases, I think it is this: that although the mere fact that a person is injured while being transported in a rail road car, does not impose upon the rail road company the burden of disproving negligence, yet that the presumption of a want of care may arise from circumstances attending the injury; and whenever such a state of things exists, the onus is upon the company to show that the injury did not result from any negligence on its part.

The proposition is laid down in substantially these terms by Ruggles, J. in the case of *Holbrook v. The Utica and Schenectady Rail Road Company*, (2 *Kernan*, 236,) where, after stating the general rule pertaining to the proof of negligence, he adds that "it generally happens that the same evidence which proves the injury done, proves also the defendant's negligence, or shows circumstances from which a strong presumption of negligence arises, and which casts on the defendant the burden of disproving it."

The case of *Curtis v. Rochester and Syracuse Rail Road Company*, (18 *N. York Rep.* 534,) presents the point still more clearly. In that case it appeared that the accident by which the plaintiff was injured, was occasioned by the running off of the cars at a switch, and the proof left it somewhat uncertain whether the switch was deranged, or the accident resulted from the spreading of the rails. The judge charged the jury that the fact that *the* accident occurred was of itself presumptive evidence of negligence on the part of the defendant. In the opinion of Judge Selden he dissents from this, if it was intended to express the abstract proposition that such a conclusion may always be drawn from the fact of the occurrence of an accident. But in respect to the lia-

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bility of rail road companies, he holds that they are bound to see that the road, and all its appurtenances, are in perfect order, and free from any defect which the utmost vigilance aided by the highest skill can discover and prevent; and that consequently whenever it appears that the accident was caused by *any deficiency in the road itself*, the cars, or any portion of the apparatus belonging to the company, and used in connection with its business, a presumption of negligence on the part of those whose duty it is to see that every thing is in order, immediately arises, it being extremely unlikely that any defect should exist of so hidden a nature that no degree of care or skill could have foreseen or discovered it. In the case then before the court he deemed it immaterial from which of the two alleged causes the accident occurred, since in either case the presumption of negligence would arise; and he held that the judge was fully warranted in instructing the jury, that the occurrence of the accident, *under the circumstances disclosed by the evidence*, authorized the presumption of negligence, and that the charge as thus interpreted was right.

The same principle is alluded to and reiterated in the case of *Johnson v. Hudson River Rail Road Co.*, (20 N. Y. Rep. 65,) although the principal question there turned upon the alleged negligence of the plaintiff. In relation to the rule on that subject, the court say that it cannot be affirmed as a universal proposition, that the plaintiff is bound to prove that he was not negligent, or the defendant to prove the contrary, yet that the character of the defendant's negligence may be such as to prove the whole issue, and in such a case the plaintiff would only be obliged to show such a state of facts, and then the onus is upon the defendant to disprove negligence.

The rule thus established was properly applied to this case. If there is any duty imperatively incumbent upon a rail road company, it is to have their track in a sound and safe condition. It is perhaps more important than that their rolling

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stock or running apparatus should be perfectly reliable and in the most complete order. If it has no track, or a chasm is suffered to exist in it, it is either incapable of performing the duties it has contracted to discharge, or it puts the limbs and lives of its passengers in jeopardy. In this case, instead of carrying the plaintiff safely over its road as the defendant contracted to do, he is, with the entire train, plunged into a gulf of some 40 feet in depth, and the track wholly submerged or swept away. The moment such a state of things was shown to exist, the presumption of negligence on the part of the defendant necessarily arose, and it required evidence on the part of the defendant to overcome that presumption, and establish affirmatively that no negligence existed on its part to which the accident could be attributed. The charge, consequently, on this branch of the case, and the various refusals to charge as requested by the defendant's counsel, in those propositions on the part of counsel which sought to reverse this rule, and throw the entire burden of proof upon the plaintiff to establish negligence by other and independent testimony, were right, and in accordance with the well settled and recognized rule of law.

The principle of law having thus been correctly laid down to guide the jury, it obviously became a question for them to decide, upon the whole evidence, whether the defendant had succeeded in removing the presumption of negligence arising from the circumstances of the case, and establishing clearly that the accident arose either from causes inexplicable and involving no responsibility on its part, or from the hidden forces of nature, and the interposition of a superior power which no care, skill or precaution on its behalf could avert or control. The precise issue was, whether the plaintiff had shown that the injury of which he complained was caused by some negligence attributable to the defendant and involving liability on its part, for the consequences. The theory of the plaintiff was that the embankment, constructed upon the side of a mountain, composed of porous materials, required not

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only great strength, but a thorough and complete drainage to carry off the water which would necessarily accumulate and press upon the structure, and soak into and saturate it if suffered to stagnate and rest against the bank, and that all these obvious safeguards and appliances were neglected and led to the catastrophe. The defendant, on the other hand, claimed that ample drainage was provided; that the structure was of sufficient strength, as had been tested by the time it had stood unaffected and undisturbed; and that conceding that a small pool of water had accumulated upon the northerly side, it could not possibly occasion the slide which occurred, and which was attributable to some hidden cause unknown to common experience, and incapable of detection by scientific skill; or by a great and unprecedented convulsion of nature which could neither have been foreseen nor provided against.

These were the grounds taken by the parties respectively, and properly urged upon the consideration of the jury; and whatever we may think of the comparative strength of the testimony, in my opinion it would be neither wise nor right to overrule their judgment, and hold as matter of law that the plaintiff had not made out any case whatever for a recovery, or that the testimony of the defendant is so clear and overwhelming that it becomes our duty to set aside the verdict as the result of either gross ignorance, partiality or corruption. If the verdict had been the other way, I should certainly not be inclined to disturb it, for it cannot be disguised that from the men of science and skill who testified on the part of the defense, an array of evidence was presented which might well have warranted a different conclusion. It is a subject of complaint, indeed, and one of the exceptions on the part of the defendant is, that the judge did not charge the jury that they should give "a controlling influence to the opinions of scientific witnesses in coming to a conclusion." This specific instruction was refused, but the judge acceded to the request, except so far as he was required to instruct the

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jury to make the evidence "controlling," and in this modified form the charge was given. And this was clearly right.

Great respect should be paid to the opinion of such a class of witnesses, but they are no more "controlling" than those of any other class or body of men when speaking upon subjects which lie within the range of common observation and experience. Men of science may as well be mistaken as men in the ordinary walks of life, and practical men have not unfrequently achieved what science had demonstrated to be unattainable.

Science proved that the Atlantic could never be crossed by a steam vessel, but a bold sailor, aided by a skillful engineer and a faithful and industrious stoker, solved the problem, by doing the thing which the theorist pronounced impracticable. It has been very well remarked that there are some points on which men of fair understanding, who have had good opportunities for observation, will not readily surrender their convictions even to the opinions of men of higher reach of mind, and whose special pursuits may have made them more conversant with such subjects. "A little method, it is said, is worth a great deal of money, and with equal truth it may perhaps be said, that in some questions which lie confessedly within the range of professional skill and experience, a little common sense may be worth a great deal of science." There is no rule of law that requires jurors to surrender their judgments implicitly to, or to give a controlling influence to the opinions of scientific witnesses, however learned or accomplished they may be, and however they may speak with conceded intelligence and authority, aided by the accumulated results of a long experience.

These views dispose of all that seems to be essential in this case; but there are some two or three collateral questions presented by the counsel upon his points, that may deserve a brief consideration.

The exception to the refusal to charge, that if the injury was caused in part by an unforeseen cause, and in part by

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a cause attributable to negligence, the plaintiff could not recover, cannot be sustained. If there is a proximate and discoverable cause which may have produced the injury, and which the evidence will warrant a jury in finding was sufficient for that end, it in no respect conduces to the defendant's impunity that another cause existed which was perhaps adequate to the production of the result. It is, in principle, like the case of *Chapman v. New Haven Rail Road Co.* (19 *N. Y. Rep.* 341,) where an action was sustained against the defendant for an injury occasioned to the plaintiff by a collision between a train of cars upon its road and one upon the Harlem rail road, and which would not have occurred but from the negligence of the latter road, in the cars of which the plaintiff was a passenger; thus, in effect, holding that although the injury was the result of two concurring causes, one party in fault is not exempted from full liability for the injury, although another party was equally derelict.

The judge was asked to charge that if the defendant employed proper persons to construct and protect the embankment, and they were guilty of no negligence in the performance of their duties, the plaintiff could not recover. This was refused, and the defendant excepted to the refusal. There is no such ground of exemption known to the law. If this were so, all that an employer would be required to show, to exempt him from liability, would be that he had used and employed men of good reputation and acknowledged skill in their particular department. Besides, the proposition contained a "*petitio principii*;" for the very question is whether there was or was not negligence in the construction and protection of the work, and no reputation of engineers or contractors will be taken as sufficient to dispose of that issue. Like any other servants of the company they may fail in their duty, and if they do, their employers must answer for the consequence.

In the case of *Hegeman v. Western Rail Road Corporation*, (3 *Kern.* 9,) the defendant employed a manufacturer

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of acknowledged skill and high reputation, to construct the axles of their cars, from the fracture of one of which the injury resulted in that case. The court held that although the axle was procured from a manufacturer of skill and reputation, and was formed from the very best material, and although there was no external indication of any imperfection in either the material or the workmanship, yet if there was any test known to men in the business which had not been applied to the work, and an injury resulted in consequence, the company was liable. This case has always been considered as carrying the doctrine of liability of rail road corporations to the extremest verge of the law, but acknowledging as we do its authority, it decides more than enough to dispose of this exception.

The defendant's counsel excepted to the modified form in which the judge charged the several propositions at folios 161, 162 and 163 of the case. He was asked to say that upon the assumption that a certain state of facts was found to exist, "the plaintiff could not recover." He declined to charge in that form, but did charge that under such a condition of things as the proposition presented, the defendant "would not be chargeable with negligence." There is no ground to complain of the charge in this form. He had already instructed the jury, that in order to entitle the plaintiff to recover, it must be proved that his injuries were caused by some negligence of the defendant. To tell them then, that if they found the existence of certain facts, the defendant was not chargeable with negligence, was to say that, in that event, the plaintiff could not recover. The two propositions, though varying in form, are in substance and effect identical, and it cannot be supposed that the jury were in any respect misled by the language of the court.

There is nothing in the exception taken on the trial to the reception of the evidence as to the declarations of the engineer of the defendant. These declarations were made by the agent of the defendant while actually engaged upon the

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work, and in respect to its proper construction, and were thus in substance a part of the *res gestæ*. Equally unfounded is the objection to the evidence as to the construction of a new ditch, after the accident. It had some bearing upon the alleged deficiency of the work. The charge of the judge upon this point was properly guarded, and the jury were told just how much weight was to be given to this evidence, and that it was to be controlled by the testimony in the cause.

These are all the points that seem to me to require discussion, and the result is that the case was fairly put to the jury, and that the judgment, together with the order denying a new trial, at special term, should be affirmed.

ALLEN and MULLIN, Justices, concurred.

MORGAN, J. dissented.

Judgment affirmed.

[ONONDAGA GENERAL TERM, October 1, 1861. *Bacon, Allen, Mullin and Morgan*, Justices.]

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Where the defendant was intrusted with a commission to purchase, in the market, for the plaintiff, as his agent, so many shares of the stock of a specified company; *Held* that this required of him to use his best judgment in making the purchase, and to obtain the stock on the most advantageous terms upon which it could be procured from an outside party; and that therefore he was not at liberty to sell his own stock to his employer.

In such a case, without passing upon, or even looking into the question of actual fraud, the transaction will be avoided on the ground that the agent is in a situation of trust which will not allow him to deal with his own property when his principal has reason to believe he is dealing with another's. The sale cannot be upheld, in the light of the simple and plain duty that

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every agent, however limited and circumscribed may be his employment, and irrespective of all questions of benefit or advantage to himself, owes to his principal.

A PPEAL from a judgment entered at a special term, dismissing the complaint, with costs. The action was brought to rescind a sale of certain stock, to the plaintiff, by the defendant. The essential facts appearing on the trial are stated in the opinion of Justice BACON.

B. F. Rexford, for the appellant. I. The facts as found by the court constituted, in law, the defendant an agent of the plaintiff in the transaction of purchasing the stock. It was an "authorizing by one person of another to do acts"—a "confiding to another" the management of some business to be transacted in his name *or on his account*. This, in law, constitutes an agency. (*Dunlap's Paley on Agency*, 1. 2 *Kent's Com.* 612.)

II. The defendant thus being the agent of the plaintiff to purchase stock, had no right to sell his own, and the sale is void. (*Dunlap's Paley*, 33 to 40, and notes. *Story on Agency*, §§ 210–212, and refs. *Moore v. Moore*, 1 *Seld.* 261, 262.) "It is a fundamental rule, applicable to both sales and purchases, that an agent, employed to sell, cannot make himself the purchaser, nor, if employed to purchase, can he be himself the seller." The expediency and justice of this rule are too obvious to require explanation. For, with whatever fairness he may deal between himself and his employer, yet he is no longer that which his service requires and his principal supposes and retains him to be. (*Gardner v. Ogden*, 22 *New York Rep.* 347, and cases there cited. *Utica Ins. Co. v. Toledo Ins. Co.* 17 *Barb.* 134, and cases there cited. *Reed v. Warner*, 5 *Paige*, 656. *Green v. Winter*, 1 *John. Ch.* 26. *Lowther v. Lowther*, 13 *Ves.* 102. *Hawley v. Cramer*, 4 *Cowen*, 734. *Michaud v. Girod*, 4 *How. U. S. R.* 552. *Darby v. Pettee*, 2 *Duer*, 150. *N. Y. Cent. Ins. Co. v. National Prot. Ins. Co.* 4 *Kern.* 85; *S. C.*

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20 Barb. 468. *Van Epps v. Van Epps*, 9 Paige, 241. *Davoue v. Fanning*, 2 John. Ch. 252. *Greenlaw v. King*, 3 Beav. 49. *Dolson v. Racey*, 3 Sand. Ch. 62. *Benson v. Heathorn*, 1 Yo. & Col. 326. *Brookman v. Rothschild*, 3 Sim. 153. *Gillette v. Peppercorne*, 3 Beav. 78.) The last three above quoted cases are "on all fours" in their facts and principles, with this case. The last case quoted presents precisely the case presented by the facts of this—of a long intimacy and confidence reposed by one in the other, and that confidence betrayed in the case quoted, secretly, by a pretended sale to a third person, but in ours without any intermediate sale. The case in 3 Sim. was affirmed in the house of lords. (See 3 Beav. 80, in argument of counsel.) That the defendant acted in this matter as a friend and not as a regular stockbroker, cannot avail him here; for, 1st. He has not made such a claim in his answer. 2d. If he had set up such a claim in his answer, it would not constitute a defense, for it is said by the master of rolls, in *Gillette v. Peppercorne*, (3 Beav. 82,) "the acting gratuitously makes no difference in my mind as to the result of this transaction. In that case the defendant, in his answer, insisted in his defense that he had not acted as the broker of plaintiff, but merely as his friend—that the prices given were the fair market prices, and that no fraud had been intended." And it is not necessary for the party seeking to rescind the contract on this ground, to show that an improper advantage has been taken over him. It is at his option to repudiate or to affirm the contract, irrespective of any proof of actual fraud. (*N. Y. Cent. Ins. Co. v. National Ins. Co.* 4 Kern. 91.) Although there may be no design to cheat, it is a constructive fraud. (*Farnam v. Brooks*, 9 Pick. 212.) The sale of this stock to the plaintiff, by the defendant, was a void sale, whether fraud in fact was practiced or not, and without any proof upon that point, or in relation to its value. "However innocent the purchase may be in the given case, it is poisonous in its consequences. *The cestui que trust is not bound to prove, nor is the court*

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bound to judge that the trustee has made a bargain advantageous to himself. The fact may be so, and yet the party not have it in his power distinctly and clearly to show it. There may be fraud, as Lord Hardwicke observed, and the party not able to prove it. It is to guard against this uncertainty and hazard of abuse, and to remove the trustee from temptation, that the rule does and will permit the *cestui que trust* to come, at his own option, and without showing actual injury, and insist upon having the experiment of another sale." (*Davoue v. Fanning*, 2 *John. Ch.* 260, 261.) "The inquiry, in such a case, is not whether there was or was not fraud in fact. The purchase is void, and will be set aside at the instance of the *cestui que trust*, and a resale ordered, on the ground of the temptation to abuse and of the danger of imposition inaccessible to the eye of the court." (*Michoud v. Girod*, 4 *How.* 557.) These sales are further, in the same case, (*p.* 553,) said to be "*fraudulent* and void, and may be declared to be so, without any further inquiry," that "such a transaction carries fraud upon the face of it." In all such cases the rule appears now to be fully settled, that the purchase, however fair and honest it may have been, must be set aside on the application of any of the parties in interest." (*Hawley v. Cramer*, 4 *Cowen*, 734, 735.) "The law does not stop to speculate upon the probability that the agent has resisted temptation. It removes the temptation by proclaiming in advance that he shall not acquire the property." (*Moore v. Moore*, 1 *Seld.* 262.) "It is not necessary to show that fraud was intended, or that loss afterwards took place in consequence of these transactions, because the defendant, though he might have entertained no intention whatever of fraud, was placed in such a situation of trust with regard to the plaintiff, that the transaction cannot, in the contemplation of this court, be considered valid." (3 *Beav.* [43 *Eng. Ch.*] 84. *Brookman v. Rothschild*, 3 *Sim.* 218, *affirmed in house of lords.*) In the case in 3 *Beavan*, it appeared, as we are told, (*page* 79,) that "There was no evi-

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dence of the prices charged being extravagant, or of any fraud having been intended." (See also argument of counsel, pages 80, 81.) Still the plaintiff succeeded in the cause. (See also *Benson v. Heathorn*, 1 *You. & Col.* 343; *Mulvany v. Dillon*, 1 *Ball & Beat.* 418; *Campbell v. Walker*, 5 *Ves.* 678; *Downes v. Grasebrook*, 3 *Mer.* 209; *Van Epps v. Van Epps*, 9 *Paige*, 242; *Campbell v. Walker*, and ref. in *n. a.*, 5 *Ves.* 678, *Sum. ed.*; *In re Wallington's Estate*, 1 *Ash.* 307; *Mills v. Goodsell*, 5 *Conn. R.* 478, 479; 2 *Sug. on Vend.* 888, and ref. in *n. 2*; *Dobson v. Racey*, 3 *Sand. Ch. Rep.* 62.) And in all such cases the agent, trustee, &c. is "liable to account in equity as for a fraud." (*East India Co. v. Hinchman*, 1 *Ves. jun.* 289. *Dunlap's Paley on Agency*, 38.) The case of *Whichcote v. Lawrence*, (3 *Ves. jun.* 740,) so far as it contravenes the above cases, is not good law. It is against them all, and is expressly questioned and overruled in *Davoue v. Fanning*, (2 *John. Ch.* 260,) and is corrected in *Attorney General v. Dudley*, (*G. Coop.* 146 to 148.) Many of the above extracts relate to purchases of property by an agent to sell; but the same rule applies to sales by an agent of his own property. See the text books where the rule is laid down as the same in both cases, and also the above extract from 17 *Barb.* 134, where the same rule is laid down by Allen, J. So, we take the rule to be clear here, that if the defendant sold this stock at its market value, or without any intention to defraud, *the sale is of itself void*. We have brought our action in a reasonable time, and on discovering the fraud. (*Gillette v. Peppercorne*, 3 *Beav.* 85. *Hawley v. Cramer*, 4 *Cowen*, 742, &c. *Fish v. Miller*, 1 *Hoff. R.* 287. 2 *R. S.* 301, § 52. *Campbell v. Walker*, and ref. *n. a.*, 5 *Ves.* 678, *Sum. ed.*) The plaintiff was, therefore, upon the undisputed facts in this case, entitled to a judgment, and without regard to the question of actual fraud.

III. This conclusion cannot be escaped by the claim that the defendant had no discretion in the matter. (1.) No such

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distinction is raised in the authorities. (2.) Such a distinction does not exist in principle. The reason of the rule applies equally to an agency to purchase a particular article at a fixed price, or the same article on the best terms that can be procured. In either case, the principal is entitled, at the hands of his agent, to his best endeavors to get the lowest terms that he can. He is also entitled to know that he is dealing with the owner of the property. The reason of the rule—the temptations held out to the purchaser—exist in either case. (3.) The plaintiff's instructions to the defendant were not absolute to purchase at \$150 per share; the agent (defendant) was required to purchase for as much less than that as possible. (4.) In this case, the price, \$150, was really fixed upon by Mr. Bond, and it is at his suggestion that the plaintiff agrees to it. It is not a case of a simple direction to an agent to purchase a certain article at a certain price; but the agent first himself offers the inducement to the principal to buy the stock, tells of its value, that he can get it; and then, when directed to buy, sells his own. Under these circumstances the defendant had no right, arbitrarily, to sell his own stock at the \$150. He had induced the plaintiff to suppose that it was worth that or more, and he had no right, having induced him to buy, to sell his own stock. He should have gone into the market and bought other stock on the best possible terms. It was not his own stock that he had been authorized to send to the plaintiff at \$150; it was some other stock belonging to some third person, as to which he says, "I know where I can get" it, that he was to buy and send to the plaintiff. (5.) There is an express authority that when an agent is directed to buy certain property at a specified price, the sale is void if the property is his own. (*See Benson v. Heathorn*, 1 *You. & Col.* 326.) In this case, (pages 339, 340,) the directors of a steam navigation company employed an agent to look out for a vessel of a particular description, (as here plaintiff and defendant had a talk about plaintiff's getting 10 shares of this stock

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and its price.) The agent reports that he has bought a ship for \$1500, (as here in his letter of January 31, the defendant writes he can get the 10 shares for the \$150 per share.) The report is adopted and the vessel taken by the company, and the money paid, (so here the plaintiff writes that he will take the shares at the price, and then takes the shares and pays the price,) but it turns out that this vessel was the property all the time of the agent, and the court declares the sale void, (and here the stock was all the time the defendant's, and we ask a similar judgment.) The facts of the case are the same; the agent in each reports what the property can be bought for, and is directed to buy for that price.

IV. This transaction is void, for the reason of the concealment by the defendant of the fact that the stock sold was his own. The authority given, taken in connection with the previous negotiation, was that the defendant should go into the market and buy 10 shares of this stock, or at least buy it of some third person, in whose hands it was on the 31st January, when the defendant wrote that he knew where he could get it. The defendant clearly had no authority to sell his own stock; he was only to buy for the plaintiff that of some other person. (*Brookman v. Rothschild*, 3 *Simons*, 153.) And upon the grounds that the defendant was only authorized to buy for us, and not to sell to us, and that he concealed the fact that he sold his own stock, pretending that it was another person's, we claim that the sale was void at our option.

H. A. Foster, for the respondent. I. The sale of the stock in question was valid. There was no fraudulent intent on the part of the defendant: and he did not desire or intend to sell any part of his own stock; and he transferred to the plaintiff because he thought he would be disappointed if he did not obtain the number of shares which he had ordered. (1.) The general rule, that an agent authorized to sell for his principal, cannot be the purchaser, or authorized to purchase for

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his principal, cannot sell to him his own property, is not disputed. And it is conceded further, *as a general rule*, in such cases, that the court will not inquire whether the sale or purchase is injurious to the interests of the principal or not, provided he at once applies to have it set aside: but in all the cases where it has been so held, *one object* at least of the agent has been, either to sell his own property, or to purchase that of his principal. (2.) In this case, the defendant, in *January*, informed the plaintiff that he did not want to sell any of his stock, although the plaintiff then wanted to purchase. When he was desired by the company to sell some of their stock, he informed the plaintiff by letter that he could get some for him at \$150 per share. The plaintiff sent him an absolute order for the ten shares at that price; but before the order arrived, the company's stock had been sold by the company, and the authority to sell withdrawn. Under these circumstances the defendant sent to the plaintiff just what he desired, and at the same price at which he had ordered it; and he sent it merely because he thought the plaintiff would be disappointed, if he failed to obtain it. What he sent him was of precisely the same value as the shares of any other person. (3.) There is no *substance* or *equity* in the claim of the plaintiff, and if it can be maintained, it must rest entirely upon the *form* of the transaction, which in this case is a mere shadow. (*See Smith v. Lansing, per Welles, J. 22 N. Y. Rep. 527; Horton v. Morgan, 19 id. 170, and per Denio, J. at p. 173.*)

BACON, P. J. The facts of this case, so far as they are necessary to be understood to present the question of law arising from them, are very few, and without dispute. They rest in part upon documentary evidence, and in part upon testimony which is unimpeached and uncontradicted. They are embraced substantially in the following brief statement. In January, 1857, the defendant was the owner of a number of shares of the Oswego River Starch Company, and the

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agent of the company in the city of New York for disposing of its manufacture. In an interview at that date between the parties, in New York, after a glowing account by the defendant of the business of the concern, and of which the plaintiff had previously no knowledge whatever, the plaintiff expressed a desire to purchase some one or two thousand dollars worth of the stock, if any was to be obtained in the market, at a price not exceeding \$150 per share. The defendant thereupon undertook to buy some if it could be procured, and if successful, he was to apprise the plaintiff, who resided in the county of Chenango. Accordingly, on the 31st of January, 1857, he addressed a letter to the plaintiff, reiterating his opinion of the value of the investment, stating that he knew where he could obtain ten shares at \$150 per share, and asking the defendant if he would like it. He states further that he does not wish to advise the plaintiff, but if he should conclude to take the stock, he would "get and send him a certificate" for that amount. The plaintiff answers this letter on the 5th of February, remarking that he liked the statement, and was willing to take that amount, and desiring the defendant to *obtain the certificate*, when he would at once put him in funds. This letter the defendant acknowledges on the 19th by a brief note, saying that he would write and get the certificate as soon as possible; and on the 25th of February he writes again, inclosing the plaintiff the scrip for ten shares of the stock, and adding in a postscript, "If we meet with no mishap, I think our stock will pay well. I could sell quick at \$150, if *I had any to dispose of.*" The plaintiff remitted the \$1500, and that closed the transaction.

What occurred subsequently it is unnecessary, in view of the question presented by the case, to allude to. It is only requisite to state that the defendant did not in fact purchase any stock from the company, or from any outside party, but caused 10 shares of his own stock to be transferred to the plaintiff; that he did not communicate this fact to the plaintiff,

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at any time during the negotiation nor subsequently, and the plaintiff was entirely ignorant of that fact, and never learned it until the month of June in the following year. At the time of this transfer the affairs of the company were in an embarrassed condition, although there is no evidence that the defendant had any knowledge of this; and in the same year, 1857, the concern was wound up, and passed into the hands of a receiver, and a new company was organized upon the ruins of the old association.

Upon the trial, these facts, with others, appeared, and the presiding justice found that the transfer was made in good faith, by the defendant, believing that the stock was worth the price he received for it, and with no intent to defraud the plaintiff; that upon the facts the plaintiff was not entitled to rescind the sale; and he ordered the complaint to be dismissed, with costs.

It is undoubtedly true that the action in this case is based mainly and prominently upon the theory of an actual fraud perpetrated upon the plaintiff by representations of the value and condition of the stock, made by the defendant, with knowledge of the falsity of such representations. This theory, however, cannot be supported. The evidence wholly fails to connect the defendant with the company in such a way as necessarily to have made him cognizant of its affairs. On the contrary, he had every assurance from the active officers and agents of the concern that they were in a palmy condition, and I concur entirely in the finding which acquits the defendant of any actual intent to deceive the plaintiff into the purchase of a worthless stock. Granting this, however, the case has another aspect which is clearly stated in the complaint, and sustained by evidence which was received without objection; and upon the case thus made the plaintiff has a right to ask relief, if by the rules of the law he is entitled to it. Upon principles well settled, both here and in England, I think the plaintiff is entitled to call for a rescission of this contract.

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It is clear that the defendant was intrusted with a commission to purchase in the market, for the plaintiff, so many shares of the stock of the company in question, and to that extent and for that purpose he was the agent of the plaintiff. This required of him to use his best judgment in making the purchase, and to obtain the stock on the most advantageous terms upon which it could be procured from an outside party. He was not at liberty to sell his own stock, for this would place him in the unauthorized position, substantially, of both a purchaser and a seller of the same commodity. Certainly he could occupy no such position without fully apprising the plaintiff of the facts and then submitting it to his judgment, whether he would or would not take the stock thus offered to his acceptance. It is quite possible that the plaintiff would have been willing to receive a transfer of the defendant's stock on precisely the same terms, and for the same price, that he had reason to believe he was paying upon an actual purchase by his agent from another source; and still it is quite as possible that the communication of such a fact might have induced him to question the propriety of the purchase. At all events he was entitled to be put in possession of the actual facts; and the suppression of them, without imputing any improper design to the defendant, which I do not believe existed, was in law a constructive fraud which, equally with actual fraud, entitles the plaintiff to relief.

The principle I have alluded to as applicable to this case is as well settled upon authority, as it is consonant with the elementary principles of fair and ingenuous dealing among men. In *The Utica Insurance Co. v. Toledo Insurance Co.*, (17 Barb. 132,) this court held that a person cannot act as the agent of both parties in the making of a contract, when he is invested with a discretion, and is bound to exercise his skill and judgment in behalf of each.

It is a fundamental principle, says Justice Allen, applicable to both sales and purchases, that an agent employed to sell cannot make himself the purchaser, nor if employed to

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purchase can he be himself the seller. The validity of such a contract does not depend upon the question whether he derives any advantage from the transaction, but the policy of the law, without inquiring into the possible benefit, or into the actual good faith of the agent, declares the act void. The same question arose in *The N. York Central Ins. Co. v. The National Prot. Ins. Co.*, (20 Barb. 468,) and was decided in the same way, and upon appeal to the court of appeals the judgment was affirmed. (See 14 N. Y. Rep. 85.) In the opinion Judge Denio reaffirms the doctrine contained in the 17th Barbour, and says that it is not necessary to relief from such a transaction to show that any improper advantage has been obtained. It is at the option of the party seeking relief to affirm or repudiate the transaction, irrespective of any proof of actual fraud, and so are all the cases.

The English decisions are uniformly to the same effect, especially in reference to transactions between trustees and their *cestuis que trust*, and in respect to all employments of a fiduciary character, and, where a special agency is created, the courts exercise a most jealous scrutiny. The case of *Gillette v. Peppercorne*, (3 Beav. 78,) may be taken as illustrative of the extent of the rule, and as presenting features strikingly analogous to the case at bar. The plaintiff employed the defendant, who was a stockbroker, to buy some canal shares. He apparently bought them of a third party who was the ostensible owner, but who it afterwards turned out held them in trust for the defendant. The court, after the lapse of several years, and without entering into the question of the fairness of the price, held the transaction void upon grounds of public policy. It was insisted in that case that the defendant was not acting in his capacity of broker, or as an agent in any sense, but gratuitously, and as the friend of the defendant; but the master of the rolls said that if that were so, and the act was gratuitous, it made no difference as to the result of the transaction.

Where an agent is employed, he remarked, it is in the

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faith that he will act for the benefit of his employer, and not with the idea that he has himself an interest in the very transaction, which may be opposed to his principal. It is not necessary to show fraud, or even ultimate loss, but the transaction is avoided on the ground that the defendant was in a situation of trust which did not allow him to deal with his own property, when his principal had reason to believe he was dealing with another. The same remark, in substance, is made by Vice Chancellor Shadwell, in *Beekman v. Rothschild*, (3 Sim. 216,) where he says, one has a right to complain if his agent does not do that which he is employed to do, and represents that he has done as he was directed, but in truth has done quite a different thing.

These cases, and the reasons and principles upon which they are founded, are decisive as to the rule which must govern in disposing of the rights of these parties. Without passing upon, or even looking into the question of actual fraud, the transaction complained of is one that cannot be upheld in the light of the simple and plain duty that every agent, however limited and circumscribed may be his employment, and irrespective of all question of benefit or advantage to himself, owes to his principal.

The judgment must be reversed, and a new trial granted, with costs to abide the event.

MULLIN and MORGAN, Justices, concurred.

ALLEN, J. (dissenting.) The question of fraud in fact, was disposed of by the judge at the circuit, and his conclusions, sustained as they are by the evidence, final. The circumstances mainly relied upon by the plaintiff, to wit, that the stock transferred was the property of the defendant, and was not a purchase by him from a third person for the plaintiff, as the latter supposed, would have been an important item in the evidence to establish actual fraud, had there been any evidence of fraudulent intent, or any circumstances upon

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which to charge the defendant with fraudulent representations or a fraudulent concealment of the true condition of the stock company. As evidence tending, as is claimed, with the other evidence in behalf of the plaintiff, to impeach the fairness of the transaction, it was urged by the judge at the trial, and clear effect given to it. As explained by the testimony, and in connection with all the circumstances and the other evidence in the case, it does not show fraud on the part of the defendant.

The only ground upon which the plaintiff can hope to succeed, is that which was mainly taken by his counsel upon the argument, to wit, that the defendant, in acting for the plaintiff in the transaction, could not at the same time act for himself, as that would be to act as buyer and seller of the stock; that having as buyer represented the plaintiff, and as seller acted for himself, the sale is void. The law of agency is well settled, and the principles contended for are well established and elementary. But to make them applicable, an agency must be shown. It must appear that the defendant was employed, with or without compensation, to do some act for the plaintiff in which a trust or confidence was reposed in him and in his discretion, and in the performance of which his judgment was called into action, and his duty to the plaintiff was inconsistent with his own interest, as the other party to the transaction. The negotiation was concerning the purchase by the plaintiff of ten shares of the capital stock, one share in which was worth as much as any other share. The price was agreed upon by the plaintiff, upon being told by the defendant the price at which the ten shares could be bought. It chanced that the stock which the defendant supposed could be bought by the plaintiff was sold by the holder before the receipt of the letter of the plaintiff directing the purchase; so that there was no alternative on the part of the defendant except to transfer ten shares of his own stock or disappoint the plaintiff, and he chose the former. On the 31st of January, 1857, the defendant wrote

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to the plaintiff that he knew where he could get ten shares at \$150 per share, and asks, "would you like it? let me know;" and says, after declining to advise him, "should you conclude to take it, however, I will get and send you a certificate of same and you can then place me in funds." The plaintiff, in reply, says, in substance, that he thinks it must be a good investment and that he would risk the amount, and adds, "you may therefore obtain the certificate and I will put you in funds on the receipt." The plaintiff made his own contract, acting upon his own judgment, reposing no confidence in the defendant, save in the honesty of his representations; and all that the defendant had to do for the plaintiff was to procure the certificate for the plaintiff; and whether the certificate represented stock once owned by the defendant, is not material. The plaintiff had of the defendant all the services for which he contracted. If A. buys a horse and there is no fraud or deceit as to his qualities and value, it cannot invalidate the contract of sale that the buyer supposes that the seller is acting as an agent when he in fact is selling his own property. If the defendant, when called upon by the plaintiff, had represented the stock to belong to a third person, and had expressly sold it to him as such, it would not have vitiated the sale. The prior ownership did not affect the value of the stock, and the price was agreed upon by the plaintiff and by the defendant or his agent. In *Gillette v. Peppercorne*, (3 *Beav.* 78,) there was an actual agency, and the real seller of the stock fixed the price as the agent of the purchaser, and that case was very clearly distinguishable from this.

The judgment should be affirmed.

Judgment reversed. and new trial granted.

[ONONDAGA GENERAL TERM, October 1, 1861. *Bacon, Allen, Mullin and Morgan*, Justices.]

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Motions for new trials are addressed to the discretion of the court, whether based upon the weight of evidence, surprise, or newly discovered evidence, or the fact that the party has been deprived of his evidence by accident, or other like grounds.

In modern practice they are liberally granted, in furtherance of justice.

In an action against one as joint maker of a promissory note, the defendant set up the defense that the signature of his name was a forgery. The note, shortly before the circuit, was put into the hands of H., a counsellor of the court, to enable him to prepare for the trial, and the cause being put over, the note remained in the hands of H., who died before the next circuit, and the note could not be found, so as to be produced on the trial. The trial was put over by the plaintiff, one circuit, for that cause. The plaintiff being still unable to find the note, the action was finally tried as upon a lost note. The plaintiff called the other maker of the note, as a witness, who testified to the signing of the note by the defendant, but the plaintiff was unable, by reason of the supposed loss of the note, to call witnesses to the handwriting. The defendant proved, by witnesses who had seen the note, that the signature was not his. The jury found a verdict for the defendant. After the trial, the note was found in the possession of one to whom H. had handed it for safe keeping. Upon a case, containing the evidence, and an affidavit stating that he could now prove the signature of the defendant to the note, the plaintiff moved for a new trial. *Held* that under the peculiar circumstances of the case the proper development of the truth, and the advancement of justice, required that a new trial should be granted.

ACTION against the defendant as joint maker of a note with one Anderson, tried before MULLIN, J. at the Oneida circuit, in June, 1859, and a verdict rendered for the defendant. The defense was that the signature of the defendant's name was a forgery. The note, shortly before the June circuit in 1858, was put in the hands of Mr. Hillis, a counsellor of the court, with a view to a preparation for a trial at that circuit. The cause was put over that circuit upon the application of the defendant, and the note remained with Mr. Hillis, who died in February, 1859. After his death the note could not be found, and the trial of the cause was put over one circuit by the plaintiff for that cause, and after exhausting every effort to find the note, the action was tried at the time mentioned, as upon a lost note. The plain-

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tiff called the other maker of the note, who testified to the signing of the note by the defendant, but the plaintiff was unable, by reason of the supposed loss of the note, to call witnesses to the handwriting. The defendant called several witnesses to whom the note had been shown by him or his agents, who testified more or less confidently that the handwriting was not in their opinion that of the defendant. Anderson was examined at length in relation to his dealings with the defendant and the circumstances under which the note was made and the transactions connected with it, and evidence was given tending, as it was claimed, to contradict him in those matters.

After the trial of the cause the note was found in the possession of one to whom Mr. Hillis had handed it with other papers for safe keeping, temporarily, as he was leaving home upon a certain occasion, and the note is now in the possession of the plaintiffs. Upon a case made containing the evidence in the action, and upon an affidavit stating the circumstances connected with the loss and subsequent finding of the note, in detail, and "that the plaintiff can now produce witnesses who knew the defendant Munroe and his handwriting, have seen him write, and will testify that the signature to the note in suit is in his handwriting," a motion was made before Bacon, J., in November, 1859, for a new trial, and the same was granted, with costs to abide the event; from which order the defendant appealed.

Mr. Cox, for the appellant.

F. Kernan, for the respondent.

By the Court, ALLEN, J. Motions for new trials are addressed to the discretion of the court, whether based upon the weight of evidence, surprise, or newly discovered evidence, or the fact that the party has been deprived of his evidence by accident or other like grounds. (*Judges of the*

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Oneida C. P. v. The People, 18 *Wend.* 79. *People v. Judges of the Dutchess C. P.*, 20 *id.* 658.) In modern practice they are liberally granted, in furtherance of justice. The discretion spoken of is said to be a legal discretion, not arbitrary, and yet it is not governed by fixed rules, for then there were no discretion. If in all cases established rules, whether of practice or statutory, controlled the judgment and action of the court in granting or refusing new trials, a new trial would be a matter of right in cases within the rule, and not a favor or in the discretion of the court. Courts could not then be governed by circumstances and "act without other control than their own judgment." Lord Mansfield says that "discretion, when applied to a court of justice, means *sound discretion guided by law*. It must be governed by rule, not by humor; it must not be arbitrary, vague and fanciful, but legal and regular." (*Rex v. Wilkes*, 4 *Burr. Rep.* 2539.) A definition which leaves but little room for the exercise of judgment, except to apply established rules of law, which is the duty of the judge in every case. Tracy, senator, says: "It (discretion) means, when applied to public functionaries, a power or right, conferred upon them by law, of acting officially in certain circumstances according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others. But what is to be understood by a discretion that *is* governed by fixed legal principles is, I must be allowed to say, something that I have not found satisfactorily explained, and what it is not easy to comprehend." (18 *Wend.* 99.) Every fixed rule of law applicable to a case must be enforced at the demand of any suitor. Courts have not the right or legal power to refuse it. When it is said that something is left to the discretion of a judge, it signifies that he ought to decide according to the rules of equity and the nature of circumstances, and so as to advance the ends of justice. (*Bouv. Law Dic. h. t.*) Whenever a clear and well defined rule has been adopted not depending upon circumstances, the court has parted with its discretion

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as a rule of judgment. Discretion may be and is to a very great extent regulated by usage or by principles which courts have learned by experience will, when applied to the great majority of cases, best promote the ends of justice, but it is still left for the courts to determine whether a case is "exactly like in every color, circumstance and feature" to those upon which the usage or principle was founded, or in which it has been applied. The action of the courts, upon applications for new trials, consists in a proper exercise of discretion—not arbitrary but legal—forming and moulding their decisions on each case according to some precedent, or upon its own particular circumstances, so as best to subserve the purposes of substantial justice. (1 *Gra. & Wat. on New Trials*, 7. *Edmondson v. Marshall*, 2 *T. R.* 4.) In practice, cases have arisen from time to time which have admitted the application of well defined principles, and which have furnished precedents for all cases reducible to that class, and to a very great extent courts have been able to classify motions for new trials, and establish appropriate rules for each class. But it has never been attempted, and is entirely impracticable with any just view of the object and purpose of this equitable branch of the jurisdiction, to prescribe general rules by which every case must be decided, however much it may differ in circumstances from every other. Hence we find that although courts adhere to the general principles which result from the succession of decisions in all cases alike in circumstances or principle, the books are full of exceptional cases, in which the development of truth and the promotion of substantial justice have been deemed sufficient reasons for granting new trials, although they were not within any former precedent, and consequently not within the operation of any principle or rule established for the guidance of courts in the exercise of their discretion.

As a general rule, new trials will not be granted to admit newly discovered evidence merely cumulative in its character to that which was given upon the trial, or to impeach the char-

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acter or credit of a witness. (3 *Gra. & Wat. on New Trials*, 1021.) But in actions of ejectment for military bounty lands, where the question was upon the identity of the soldier and patentee, both rules were disregarded owing to the obscurity, and the multifarious frauds, attendant upon those titles. The court was of the opinion that the peculiar circumstances of the cases took them out of the general rule, and that the ends of justice were to be best answered by granting new trials more liberally than was done in ordinary cases. (*Jackson v. Kinney*, 14 *John*. 186. *Jackson v. Crosby*, 12 *id.* 354. *Jackson v. Hooker*, 5 *Cowen*, 207.)

It is very evident that the plaintiff labored under a great disadvantage, if in truth the note is genuine, in not being able to produce it upon the trial. The principal witness had been and then stood indicted for its forgery, and the production of the note upon the trial of that indictment was necessary to a conviction, and its non-production upon the trial of this action, and its alleged loss, might well be used with great force in the impeachment of the witness as well as the note. It is equally clear that the highly respectable witnesses called to disprove the genuineness of the note, could not testify as satisfactorily to themselves, or to the court or jury, as they could have done with the note before them; and had the verdict been for the plaintiff, and the note subsequently brought to light, it would have been almost a matter of course to grant the defendant a new trial, with a view to the elucidation of the truth. In the cross-examination of their witnesses, the plaintiffs could not test the accuracy of their judgment by the note itself, and had not the means to convince them, by a deliberate examination of the signature, and questions properly put relating to the peculiarities of the handwriting, that it was genuine and not forged. The plaintiffs are without fault, and are guilty of no negligence in not producing the note at the trial, although not surprised, in the ordinary sense of that term. In practice, by surprise is understood that situation in which a party is placed without any default

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of his own which will be injurious to his interest. The courts always do every thing in their power to relieve a party from the effects of a surprise when he has been diligent in endeavoring to avoid it. (*Bouv. Law Dic. h. t.* 1 *Clarke's R.* 162. 3 *Bouv. Inst.* 512.) The plaintiffs were in a situation in which their interests were liable to suffer without their fault, and after having been diligent in their efforts to avoid it, and when they had no reason to suppose after the search already made for the note that a further postponement of the trial would benefit them. The event shows that a postponement would have enabled them to produce the note, and for this reason, proceeding to trial under a mistake, they are entitled to relief. (3 *Bouv. Inst. supra.*) It is in a sense newly discovered evidence, and not of the same character as that given upon the trial. It is a higher grade. Had the plaintiffs been able to produce the note, they would not have been permitted to give secondary evidence of it. It would have been the highest and only competent evidence of its existence. Evidence is not strictly cumulative which is of a different kind and character from that adduced on the trial. In *Guyot v. Butts*, (4 *Wend.* 579,) the evidence on the trial was circumstantial and the evidence newly discovered was positive and direct, and a new trial was granted. But the case cited is more important as illustrating the shades of difference which will be regarded as taking a case out of the general rules when a full and fair investigation of truth demand it. The circumstances in that case were that the demand was stale, and the defendants were executors, without the means of discovering and collecting facts which the immediate parties to the transaction had, and the last circumstance chiefly influenced the court in granting the new trial. And see per *Woodworth, J.*, *Porter v. Talcott*, (1 *Cowen*, 381, 2,) as to what is and is not considered cumulative evidence when the ends of justice require a retrial of an issue of fact.

Other cases may be cited, showing the liberality of courts

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in granting new trials when it is apparent that without the fault of the party asking it, or any neglect on his part, he has been deprived of some important evidence, either parol or documentary. In an action on a policy, where the defendant by the mistake of his witness failed in producing the necessary document from the admiralty for proving a breach of the convoy act, the court granted a new trial in order to let him into his defense after verdict found for the plaintiff on the merits. (*D'Aguilar v. Tobin*, 2 *Marsh.* 265.) See also *Richards v. Lewis*, (11 *C. B.* 1035,) where a new trial was granted, although the party had not made inquiry of all the parties in whose possession the necessary document might be supposed to be, on the ground of surprise. The search was held clearly insufficient to authorize secondary evidence to be given, and yet relief was granted. And in *Doe v. Errington*, (2 *Har. & W.* 448,) where a plaintiff had been non-suited on the ground of non-production of a bill of exchange, the court granted a new trial upon an affidavit that the bill had been sent out of the jurisdiction of the court; had been sent for in due time, but not received until too late for the trial; and that it was then in the plaintiff's possession. (*Atkins v. Owen*, 4 *Nev. & M.* 123.)

The case before us is peculiar in all its circumstances upon which the application is founded. It is not within any of the precedents cited, and is so peculiar that it can scarcely be expected to serve as a precedent for the future. The jury have not had the best means of arriving at the truth, the plaintiffs have been deprived without their fault of a very important piece of evidence differing in character from that which they gave upon the trial, and are now able by this newly discovered evidence to remove a very just ground of suspicion that rested upon their case. The case is important in amount, and in its result involves the character of the principal witness. The granting of a new trial does not reflect upon the merits of the defense, as it does not touch the merits of the action; and if the signature of the defendant

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has been forged, the production of the note will enable him to prove it, most clearly, while to refuse the new trial would be to exclude the very best evidence of which the case is susceptible and which could have been produced on the trial.

I am of the opinion that the proper development of the truth and the advancement of justice required a new trial to be granted, and that the order should be affirmed.

[ONONDAGA GENERAL TERM, JANUARY 1, 1861. *Bacon, Allen, Mullin and Morgan*, Justices.]

MARSH vs. THE ONEIDA CENTRAL BANK.

Where money is deposited in a bank, generally, to the credit of the depositor, and is not appropriated to the payment of a note of the depositor, held by the bank, or to any other special purpose, the relation of debtor and creditor is created, between the depositor and the bank; the latter becoming a debtor to the former for the amount deposited, and liable to pay on demand. The bank has the right, at any time, to apply the amount in payment of a note past due, but is under no obligation so to apply it.

If it omits to make the application, and postpones it until after the recovery of a judgment upon the note, this will not affect the right. It may apply the money after as well as before the recovery of the judgment, in payment of the debt due from the depositor.

Whether the application is made, or not, is immaterial. If not made, the bank may, in an action by the depositor, or his assignee, to recover the money deposited, avail itself of its judgment as an equitable set-off.

THE plaintiff brought his action before a justice of the peace, to recover \$75 deposited with the defendant by one Thomas C. Hyland. The defendant alleged that the money was deposited by Hyland in part payment of a note of Hyland held by the bank and past due, and by way of counterclaim set up a judgment recovered in this court against Hyland, upon the note. The note was for \$123.08, and became due in September, 1857, and a judgment was recov-

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ered thereon by the present defendant, on the 25th day of December, 1858. The claim for the money deposited was assigned to the plaintiff July 28, 1859, and a demand of the money made by the plaintiff in October, 1859. This action was commenced on the 21st day of October, 1859. The justice gave judgment for the plaintiff, which, upon appeal, was affirmed by the county court of Oneida county, and the defendant appealed to this court from the latter judgment.

G. F. Bicknell, for the appellant.

S. Van Dresar, for the respondent.

By the Court, ALLEN, J. There was some conflict in the evidence touching the deposit, and whether the money was deposited generally to the credit of the depositor or as a partial payment of the note of the depositor then past due and held by the defendant. All the evidence, including that of Hyland, the depositor, I think, clearly shows that the money was specially deposited as a partial payment of the note, although not formally applied, for the reason that the note was not paid in full. If so paid, it could not be withdrawn until the note should be otherwise disposed of. But it is not necessary to pass upon this question of fact. Upon the theory of the plaintiff that the money was deposited generally to the credit of Hyland, and was not appropriated to the payment of the note, or to any other special purpose, the judgment should be reversed. The plaintiff, as the assignee of a chose in action not negotiable, takes subject to all the legal as well as equitable rights of the defendant against the assignor. The deposit not being a special deposit entitling the depositor to a return of the same money deposited, in specie, created the relation of debtor and creditor between the depositor and the bank, the latter becoming a debtor to the former for the amount deposited, and liable to pay on demand. (*Ketchum v. Stevens*, 6 Duer, 463;

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affirmed, 19 *N. Y. Rep.* 499. *Beckwith v. The Union Bank*, 4 *Sandf. S. C. R.* 604; *affirmed*, 5 *Seld.* 211. *Commercial Bank of Albany v. Hughes*, 17 *Wend.* 94. *Dykers v. Leather Manufacturers' Bank*, 11 *Paige*, 612.) The bank had the right at any time to apply the amount in payment of the note then past due, (*Commercial Bank v. Hughes, Ketchum v. Stevens, supra.*) As the plaintiff insists that the money was not paid upon, or in part payment of, the note, there was no obligation upon the defendant so to apply it. It was optional with the bank whether it would do so or not; but omitting to make the application, and postponing it until after the recovery of the judgment, did not affect the right. After as well as before the recovery of the judgment, the right of the defendant to apply the money in payment of the debt due from the plaintiff's assignor was perfect. The officer of the bank testified that the application was made; but whether it was or not, is immaterial. If it was not made, then the defendant was the debtor of Hyland to the amount of the deposit, and the latter was the debtor of the bank to the amount of the judgment, and the one constituted a legal as well as equitable set-off against the other. The bank was not bound to pay the checks of Hyland, or regard the transfer to the plaintiff, made after the right of the defendant to set off the judgment had accrued. (*McGuinty v. Herrick*, 5 *Wend.* 240. *Robinson v. Howes*, 20 *N. Y. Rep.* 84. *Code*, § 112. 2 *R. S.* 354.)

We cannot regard the documentary evidence not before the justice. If, for no other reason, it must be disregarded because it relates to facts which have transpired since the trial before the justice and about the time of the affirmance of the judgment by the county court. The judgments of the county court and of the justice must be reversed.

[ONONDAGA GENERAL TERM, January 1, 1861. *Bacon, Allen, Mullin and Morgan, Justices.*]

MCEACHRON *vs.* RANGLES.

34	
18h	20
30a	558
87a	465

If the purchaser of goods, which, by the terms of the contract of sale, are to be delivered and paid for at a specified time, does not tender the price and take the goods within the time agreed upon, the vendor may request him to pay for and take the goods, and in case of his refusal may abandon and rescind the contract, and dispose of the goods as if no contract had been made; or he may, on due notice to the purchaser, resell the goods as the property of the latter, and recover of him the sum lost by the resale, together with the expenses of keeping the goods.

This right of the vendor to resell the goods, however, when the contract is not rescinded, and when there is no express stipulation authorizing it, in the contract, can only be exercised after due notice to the purchaser, of the time when and the place where the resale will be made.

It is not a ground of error that when the jury returned, to render their verdict, in a justice's court, no one appeared or answered for the plaintiff.

If the plaintiff is present when the jury deliver their verdict, and if, being so present, he is called, before the verdict is received, the fact that no one appears for him, or answers for him, is no ground for not receiving the verdict.

To make the point available as a ground of error, that the directions of the statute have not been complied with, it should be stated that, when the verdict was received, the plaintiff was *absent* and no one appeared or answered for him.

THIS was an appeal from a judgment of the county court of Washington county. The action was commenced in a justice's court. The plaintiff alleged, in his complaint, that on the 1st of June, 1859, he contracted to sell, and did sell, to the defendant, twenty-four lambs, at \$2 each, to be taken away by or before the last day of August thereafter. That on the 6th day of July, 1859, the defendant took away five of them, paying \$10 therefor, and that he neglected and refused to take away the remainder, by or before the last day of August, or afterwards. That on the 15th of September, 1859, the plaintiff requested the defendant to take away and pay for said lambs, which he refused to do, and thereupon the plaintiff, on the first day of October, 1859, sold the said lambs, for the best price he could, to wit, six shillings apiece, and no more, he having kept them, in the meantime. Wherefore the plaintiff claimed \$25 damages, including \$5 for keeping the lambs from the 1st of August to the last of Oc-

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tober, 1859. The defendant, in his answer, denied the allegations of the complaint, and alleged that the lambs, if any contract or sale was made, were to be delivered, provided the plaintiff should feed or make them fat and in good condition, or change their pasture, as he agreed to do. And that the plaintiff did not properly feed them, but kept and fed them so poorly that they were in poor condition, and worth little or nothing to the defendant; wherefore the plaintiff ought not to sustain the action. The defendant further alleged that if he made the contract at all, he made it as the agent of one Alexander Cheny. On the trial before the justice, the plaintiff was called as a witness in his own favor, and testified as follows: "I sold to defendant last summer 21 lambs at two dollars per head. It was not far from the last week in May or forepart of June I met the defendant on the road; no one was present but us. Defendant said, do you want to sell your lambs; I told him I intended to sell them all; defendant said he was buying lambs. I asked him if he had seen my lambs; defendant said he had seen them two or three days before. Defendant said he would give me two dollars per head, and take them away through the summer, would take some in July—all to be taken away in August. I asked defendant if he wanted me to alter them; he said, let them be as they are. Defendant then said, I suppose you want some money on them, or I ought to pay some money on them; I told him he might do as he pleased; defendant did not pay any money on them. Defendant asked me how many lambs I had; I told him twenty-one; defendant then took out his book and motioned as though he was writing. Defendant came back about the 8th day of July last and told me to bring up the sheep, and he would take some of those lambs away. I brought up the sheep; defendant took five, and paid me \$10. Defendant said they did not seem to be thriving; I think there are too many together; can't you give them a better chance. I told him I would do as well as I could; that I had a field in my back lot that

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I could not get at till my rye was cut; I would then separate them, and put them in that lot. I did put ewes and lambs in that field. Defendant did not come and take away the remainder of the lambs. Defendant called afterwards and said, you have not changed those lambs yet; I said I would when I could; it was about the 20th or 25th of July. Defendant said he calculated to do as he agreed, and said that I had not put up those lambs as I agreed; I told him if he did as he agreed, that was all I wanted. I did not again see him until after the last of August; somewhere about the 15th day of September I saw him again; I went on purpose to see him; I found him at his father's, in Hebron; I searched for him at his own residence; I told him I had tried pretty much all the afternoon to find him; I wanted to know what he was going to do about those lambs. Defendant said, you have kept those lambs until the time is passed; you may sell them, or do what you please with them. I said, if I had known you was going to serve me this way, I would have sold them before. That is, in substance, all I recollect was said. I afterwards sold those lambs the last of September. I sold them to Burnham for the best price I could get." Being asked, "What did you get?" The question was objected to: 1st. Because the difference between the contract price, and what plaintiff got of Burnham, was not the proper rule of damages. 2d. That it was irrelevant and immaterial. Objection overruled, and the witness answered, "I got six shillings per head. I am a farmer; have kept sheep. I know the price per week for keeping sheep and lambs, at grazing." The witness was then asked "what it was worth to keep lambs?" The question was objected to because the witness was not shown to be competent, and the objection was sustained. The defendant testified that at the time of making the contract he told the plaintiff he would not take the lambs "unless they were fat," and that the plaintiff made no reply. The plaintiff, in his testimony, denied that the defendant made that remark. It was proved

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by other witnesses that seventy-five cents each was the fair market value of the lambs at the time the plaintiff sold the same to Burnham. The plaintiff's counsel requested the justice to charge the jury that if the sale of the lambs from the plaintiff to the defendant was absolute, then the fact that they were not fat formed no defense, as the contract was entire, and by taking away a part he had accepted of all. The justice so charged. The defendant's counsel asked him to charge the jury, that if the contract was specific that the plaintiff was to feed the lambs and make them fat, the plaintiff could not recover unless they found that the plaintiff performed specifically; and the justice did so charge, substantially. The jury found a verdict in favor of the defendant, and judgment was rendered by the justice, against the plaintiff, for costs. The plaintiff appealed to the county court, stating the following grounds of appeal:

"1. The justice erroneously charged the jury, that if they found that the sale was specific, the plaintiff could not recover, if he failed to perform even the least part of his agreement.

2. The verdict of the jury and the judgment rendered thereon was against the law and evidence in the case.

3. When the jury returned to render their verdict, no one appeared or answered for the plaintiff, and the justice is required to state the facts in that regard.

4. The judgment was not rendered upon the verdict, nor were the costs made up until the next day after the trial, and the justice is required to answer specifically with regard to that.

5. The justice erred in not allowing the plaintiff to show what the keeping of lambs was worth.

6. The justice erred in not striking out of the evidence that part of the defendant's testimony, that he would not take them unless they were fat.

7. The judgment is against law and evidence; the sale of the lambs was absolute in the first instance, and if not, be-

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came so by acceptance of part, and that they were not fat is no objection to the plaintiff's right to recover."

The judgment of the justice was reversed, by the county court; and the defendant appealed to this court from the judgment of the county court.

E. Hill, for the appellant.

J. S. Coon, for the respondent.

By the Court, ROSEKRANS, J. If the vendee of goods, which, by the terms of the contract of sale, are to be delivered and paid for at a specified time, does not tender the price and take the goods within the time agreed upon, the vendor may request the vendee to pay for and take the goods, and in case of his refusal may abandon and rescind the contract and dispose of the goods as if no contract had been made; or he may, on due notice to the vendee, resell the goods, as the property of the vendee, and recover of the vendee the sum lost by the resale, together with the expenses of keeping the goods. This rule was established in this court more than half a century ago; and has never been questioned. (*Sands v. Taylor*, 5 John. 396. *Bement v. Smith*, 15 Wend. 497. *Crooks v. Moore*, 1 Sandf. S. C. R. 297, 302.) The right of the vendor, under the circumstances stated, to treat the contract of sale as abandoned and rescinded, was declared by Justice Holt in 1 Salk. 113. If the contract is rescinded, the rights of the parties are the same as if the contract had never been made. (2 *Parsons on Contracts*, 189. 2 *E. & B.* 175. 3 *C. & R.* 678.) No action can be founded upon it by either party. If the goods are resold by the vendor, after the contract of sale is rescinded, it is a sale of his own goods, not of the vendee's. If the contract is not rescinded, and the goods are resold, they are sold as the property of the vendee. Spencer, J. said, in *Sands v. Taylor*, (*supra*), "There are no decisions in the books which

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either establish or deny this rule; but it appears to me to be founded on principles dictated by good sense and justice." The vendor is said to be, by necessity, the mere agent or trustee to manage the property, and being thus constituted agent or trustee, he must either abandon the property, or take a course more to the advantage of the vendee, by selling it. The property sold, in that case, was perishable. Van Ness, J. said, "The article was perishable, and the interests of all parties required that the most should be made of it." Kent, Ch. J. said, "The usage in such cases, is to sell the article after due notice to the other party to take it, and that in default of doing it, the article will be sold." "It would be unreasonable to oblige the vendor to let the article perish on his hands, and run the risk of the solvency of the vendee."

In *Maclean v. Dunn*, (4 Bing. 722,) Best, Ch. J. said, "It is admitted that perishable articles may be resold. It is difficult to say what may be esteemed perishable articles and what not; but if articles are not perishable, price is, and may alter in a few days, or a few hours." "It is a practice, therefore, founded on good sense, to make a resale of a disputed article, and to hold the original contractor responsible for the difference. The practice itself affords some evidence of the law, and we ought not to oppose it except on the authority of decided cases." "We are anxious to confirm a rule consistent with convenience and law. It is most convenient that when a party refuses to take goods he has purchased, they should be resold, and that he should be liable for the loss, if any, upon the resale. The goods may become worse the longer they are kept; and, at all events, there is a risk of the price becoming lower."

It is not perhaps material, at this late day, to inquire whether the rule is founded upon any other basis than that of usage and convenience. The vendor never could sell and satisfy his lien for the price of the goods. (*Cross on Liens*, 47.) The usage probably had its origin in the stipulation

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for a resale, and the fact that an express contract was usually printed in the conditions of sales at auction, or in contracts entered into by the East India Company, (*Maclean v. Dunn*, *supra*; *Chitty on Contracts*, 431, ed. 1844.) It is sufficient that the rule has been established. The right however to resell goods, under the rule, when the contract is not rescinded, and when there is no express stipulation authorizing it in the contract, can only be exercised by the vendor after due notice to the vendee, of the time when and place where the resale will be made. This course was adopted in *Sands v. Taylor*, in which the rule was established; and in *Crooks v. Moore*, and *Maclean v. Dunn*. Property pledged as security for a debt can only be sold after the debtor has been called upon to redeem the pledge, and after due notice of the time and place of sale. (*Stearns v. Marsh*, 4 *Duer*, 227, 232.) It is quite as material for the interests of the vendee of chattels, who is to be charged with any deficiency which may arise upon a resale, that he should have notice of the time and place of the resale; and none the less reasonable and just, that he should have such notice. The plaintiff did not demand payment of the price of the property sold, nor did he aver or prove that he gave notice to the defendant that in case he did not pay the price or take the property the plaintiff would sell it and hold the defendant for any deficiency, or that he would sell it at all. To the plaintiff's question, "I want to know what you are going to do about those lambs?" the defendant replied, "you have kept them until the time is past; you may sell them or do what you please with them;" and the plaintiff rejoined, "if I knew you was going to serve me in this way, I would have sold them before." This was the substance of all the conversation, in the only interview between the parties after the time when the property was to have been paid for and taken by the defendant, and the time of the resale. The defendant objected to proof of what the plaintiff obtained on the resale, as irrelevant and immaterial; also

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to proof of what it was worth to keep the property, for the same reasons.

Upon the plaintiff's case, as made by himself, he did not show any cause of action. Had he been allowed to give the proof which was objected to and rejected, it would not have helped his case. Under the circumstances, the language of the defendant could only be construed into a consent to abandon the contract, and the act of the plaintiff in reselling the property, as an assent on his part to a rescinding of the contract.

The third ground of appeal stated in the plaintiff's notice of appeal is insisted upon as sufficient to require a reversal of the judgment of the justice. It is in these words: "When the jury returned to render their verdict, no one appeared or answered for the plaintiff." Assuming the fact to be as stated, it is no ground of error. The statute does not require "that any one shall appear for the plaintiff on receiving the verdict." It declares, (1 R. S. 143, § 110, 5th ed.) "Previous to receiving the verdict, the plaintiff shall be called." This was done by the justice, or at least it was not alleged as a ground of error that he was not called. The section then proceeds as follows: "If he, the plaintiff, *be absent*, and no one appear for him, the verdict shall not be received." To have made this point available as a ground of error, it should have been stated that the *plaintiff was absent* when the verdict was received, and no one appeared or answered for him. If the plaintiff was present when the jury delivered their verdict, as we must assume that he was, from the fact that the point was not taken; and if being so present, he was called before the verdict was received, as we must also assume for the same reason; *the fact that no one appeared for him or answered for him*, is no ground for not receiving the verdict. If he was present when he was called, and made no answer, the verdict was properly received. *Qui tacet consentire videtur*. This was held in *Oakley v. Van Horn*, (21 Wend. 306.) Cowen, J. says: "The statute is merely

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directory, in respect to the ceremony of calling the plaintiff. The object is to ascertain whether he be present; and it is enough that he be *actually present*, and not objecting. *Non constat*, that he was desirous to have a nonsuit entered. If otherwise, he might have said so; or have actually withdrawn, as in *Platt v. Storer*, (5 *John*. 346.)”

It is unnecessary to consider the other questions in this case. The judgment of the county court should be reversed and that of the justice affirmed.

WARREN GENERAL TERM, July 9, 1861. *Rosekrans, Potter and Bockes*, Justices.]

THE SHALER AND HALL QUARRY COMPANY *vs.* BLISS and others.

34 309
27a 297

The liability of trustees of a corporation, for failing to make the annual report required by the 12th section of the act of February 17, 1848, authorizing the formation of corporations for manufacturing, mining, mechanical or chemical purposes, is in the nature of a penalty or punishment for the omission of a duty. The liability attaches to the individuals, who may change, and not to the office, which does not change.

The section should be construed as though the words “during their continuance in office” had been added, at the end thereof.

Accordingly *held* that the trustees who have neglected to make their report are not personally liable for debts not contracted until after they have ceased to be trustees of the company.

THIS action was brought to charge the defendants with a debt of “The Hudson River Stone Dressing Company,” a corporation organized under the act of this state of February 17th, 1848, authorizing the formation of corporations for manufacturing and other purposes. The complaint alleges a sale and delivery by the plaintiff to said Hudson River Stone Dressing Company, on or about the 12th day of April, 1854, of goods &c. to the value of \$2042.15, and that said company accepted two drafts drawn by the plaintiff for said goods,

The Shaler and Hall Quarry Company v. Bliss.

&c.; said drafts respectively bearing date April 20th and 27th, 1854, for the sums of \$832.75 and \$1209.40, and both payable in three months from their dates. The complaint further alleges the due presentment and non-payment of said drafts, and that the sums of money therein specified are still due to the plaintiff. The complaint also avers that the defendants were duly appointed the trustees of said corporation, on or about March 31st, 1853, and accepted said office and continued therein until the 18th day of April, 1854; that said corporation failed to make, within twenty days from the first day of January, 1854, the report required by the 12th section of said act of 1848;(a) and that no report containing the statements required by said section was made until July 31st, 1854. The said drafts respectively fell due on the 23d and 30th days of July, 1854. The answer denies any sale and delivery, &c. as alleged, *prior to the 19th of April, 1854.*

The action was tried before his honor Justice SUTHERLAND, without a jury, who found as facts in the case: The due incorporation of the plaintiff, and of said Hudson River Stone Dressing Company; the sale and delivery by the plaintiff to said Stone Company, "on or about the 19th day of April, 1854, and after the 18th of said April," of stone to the value alleged in the complaint; that acceptances were given therefor, which have been lost; that nothing has been paid on said debt; that the defendants ceased to be trustees of said Stone Company on the 18th day of April, 1854; and that said company did not, within twenty days from January 1st, 1854, make the report required by said 12th section of the act of 1848, and that no report of the condition of the company was filed until July 31st, 1854. From these facts his honor found as a conclusion of law, that the defendants were entitled to judgment, "on the ground that the debt for which the action was brought was not contracted until after they had ceased to be trustees of the company." Judgment

(a) Laws of 1848, p. 57.

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having been perfected in favor of the defendants, upon said decision, the plaintiff appealed therefrom.

H. & C. S. Andrews, for the appellant.

Charles F. Sanford, for the respondents.

BY THE COURT. We think the construction of § 12 of the act, by the court below, was correct. The liability of the trustees, by that section, is of the nature of a penalty or punishment for the omission of a duty. The section was properly worded, without reference to the fact that there would be or might be a change of trustees. The liability attaches to the individuals, who may change, and not to the office, which does not change.

We think that the section should be construed as though the words “during their continuance in office” had been added to the end of the section. It may be said that these words are impliedly added.

The judgment below should be affirmed, with costs.

[NEW YORK GENERAL TERM, May 6, 1861. *Clerke, Leonard* and *Sutherland*, Justices.]

 MORANGE vs. MORRIS.

The refusal of a purchaser to complete his purchase, because there is a lease on the premises, will not deprive him of the right to object that there are other incumbrances on the same property.

Such refusal might relieve the vendor from the necessity of tendering performance, on his part, but will not relieve him from the consequences of not being able to give a good title to the premises, at the time agreed on.

If there are incumbrances upon the property, they should be removed before the time fixed for completing the contract.

Where the vendor is unable to perform, performance on the part of the purchaser is not necessary; except in case the purchaser seeks to compel a performance, or to recover damages without rescinding the contract.

If the vendor cannot give a good title, at the time agreed on, the purchaser has a right to refuse to take the property, and to rescind the contract.

34	311
42k	48
77a	319

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THE parties entered into a contract, in August, 1857, by which the plaintiff agreed to purchase certain real estate of the defendant, consisting of ten lots of land in the city of New York. By the terms of the agreement the plaintiff was to pay \$1500 upon the execution thereof, and another payment was to be made on the 21st of September, 1857, at 12 o'clock, noon, at the office of J. Van Namee, 133 Nassau street, New York, when the defendant was to execute and deliver a deed of the land, free from all incumbrances, &c. The plaintiff alleged in his complaint that he did, upon the execution of said agreement, pay to the defendant on account thereof, as required to do in and by said agreement, the sum of \$1500, and that he was, on the said 21st day of September, and ever since has been, ready and willing to keep, perform and execute each and every other condition in said agreement mentioned, to be by him kept, performed or executed; but that the defendant did not, on the said 21st day of September, keep, perform or execute, nor was he on said day, nor at any time since, ready to keep, perform or execute the terms, conditions and stipulations mentioned and agreed in said agreement to be kept, performed and executed by him; but that the defendant, on said 21st day of September, was, and ever since has been, totally unable to keep, perform or execute the said agreement on his part, in that he could not on said day, nor at any other time since, convey or assure to the plaintiff the fee simple of the lots in said agreement mentioned, free from all incumbrances, except those therein mentioned. And the plaintiff averred specially, that the defendant had not, on said 21st day of September, nor has he had at any time since, a good and sufficient title in fee to the lots in said agreement mentioned, nor was the defendant then able, nor has he been able at any other time since said day, to convey or assure to the plaintiff, as he agreed to do by said agreement, the fee simple of said lots or either of them; that on the said 21st day of September, the lots mentioned in said agreement were, and ever since have been, in-

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cumbered with liens and charges for taxes and assessments, before said 21st day of September levied, imposed and charged to and upon said lots, the amount of which said liens and charges exceeded the sum of \$1600, and that said taxes and assessments are still unpaid, and are legal and valid liens and incumbrances upon said lots. The plaintiff further alleged that by reason of the defendant's failure and inability to convey and assure to him the fee simple of said lots, free from incumbrances, as the defendant agreed to do in and by said agreement, he, the plaintiff, had rescinded the agreement, and had demanded from the defendant the return and repayment to him of the said sum of \$1500 paid and advanced by the plaintiff to the defendant, on the execution of said agreement; but the defendant had refused and neglected, and still neglected and refused to return or repay said sum, and every portion thereof, to the plaintiff. And the plaintiff alleged that by reason of the defendant's failure and inability to perform the said agreement on his part, he, the plaintiff, had sustained great damage and injury, to wit, the said sum of \$1500, so paid and advanced by him to the defendant on the execution of said agreement, together with the interest thereon, and the further sum of \$55.75, by the plaintiff paid, laid out and expended in and about the examination of the defendant's assumed title to the said lots, and in and about the searches for liens and incumbrances of, upon and affecting the said lots. For which sum the plaintiff prayed judgment.

The answer alleged that Morris attended, on the day and at the place mentioned, ready to deliver the deed, but that the purchaser made default. The answer further alleged that the defendant, on the said 21st day of September, called upon the plaintiff at his office, and there tendered the deed, and offered to keep and perform the covenants and conditions in the agreement, but the plaintiff made default. The answer then admitted that on the said 21st day of September the lands in question were, and ever since have been, incumbered with certain liens and charges for taxes and assessments, ex-

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ceeding \$1600 ; but the defendant averred that he was ready and willing, on the said 21st day of September, to fully pay and discharge all and every of such liens and charges, and should have done so at that time, had the plaintiff been ready and willing to keep and perform the agreement on his part.

And for a further and separate defense, by way of counter-claim, the defendant alleged that at the time said agreement was made and entered into, there was due to him the sum of \$125, for rent of the lots of land and premises therein described, for one quarter from the 1st day of August to the 1st day of November, 1857, payable in advance. And that the plaintiff did afterwards, and on or about the 12th day of August, 1857, receive the said sum of \$125 for said quarter's rent from the tenant then in the possession and occupation of said lots and premises, which said sum the plaintiff had never paid over to the defendant, but appropriated the same to his own use.

The action was tried at the New York circuit, in May, 1859, before Justice ALLEN and a jury. The counsel for the plaintiff moved the court that judgment be rendered for the plaintiff upon the pleadings, on the ground that it was averred in the complaint, and admitted by the answer of the defendant, that on said 21st day of September, 1857, the lots mentioned in said agreement were, and ever since had been, and then were, incumbered with liens and charges for taxes and assessments before said 21st day of September levied, imposed and charged to and upon said lots, the amount of which said liens and charges exceeded the sum of \$1600, and that therefore the defendant, on said 21st day of September, was, and ever since had been, totally unable to convey or assure to the plaintiff the fee simple of the lots in said agreement mentioned, free from all incumbrances, except those therein mentioned. The court thereupon decided that the plaintiff was entitled to judgment against the defendant upon the pleadings, on the ground above mentioned, for the amount

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claimed in the amended complaint, less the amount of the counter-claim of the defendant set up in his answer, with interest, and directed the jury to find a verdict for the plaintiff for that amount; to which decision and direction the counsel for the defendant excepted. The jury found accordingly, and from the judgment entered upon their verdict the defendant appealed.

T. J. Glover, for the appellant.

Wm. Fullerton, for the respondent.

By the Court, INGRAHAM, J. The refusal of the plaintiff to complete his purchase because there was a lease on the premises, did not deprive him of the right to object to other incumbrances on the same property. Such refusal might have relieved the defendant from the necessity of tendering performance on his part, but did not relieve him from the consequences of not being able to give a good title of the premises at the time agreed on.

The incumbrances should have been removed before the time fixed for completing the contract. (*Lawrence v. Taylor*, 5 Hill, 115, and cases cited.)

Performance on the part of the plaintiff was not necessary if the defendant was unable to perform; except in case the plaintiff sought to compel performance, (*Wells v. Smith*, 7 Paige, 22,) or to recover damages without rescinding the contract. As the defendant could not give a good title at the time agreed on, the plaintiff had a right to refuse to take the property, and to rescind the contract.

Judgment affirmed, with costs.

[NEW YORK GENERAL TERM, May 6, 1861. *Clerke*, *Ingraham* and *Sutherland*, Justices.]

LINDEN *vs.* GRAHAM.

One who is the owner in fee and in the possession of real estate, subject to the right of dower of a widow therein, may maintain an action against the widow, under the act of April 12, 1855, to provide for the due apportionment of taxes and assessments, &c., for an adjustment and apportionment of the taxes and assessments which are a lien upon the premises, and for a decree directing the widow to pay her proportion of such taxes and assessments, viz. such portion thereof as has been assessed upon the property set off to her for dower.

THE complaint in this case alleged that the plaintiff was the owner, by lawful title in fee and in possession, of certain premises therein described, subject to the dower right of the defendant; that the defendant is the widow of William Graham, deceased, who, at the time of his death, was the owner of two lots of land on the southeasterly corner of the Eighth avenue and Thirty-fifth street in the city of New York, being in front on the Eighth avenue forty-eight feet four and one-half inches, and on Thirty-fifth street seventy-seven feet and four inches; that the heirs of said Graham conveyed said premises to James Linden, and said Linden subsequently, and on or about the 25th day of April, 1852, conveyed all his right, title and interest in said premises to one Owen Dunigan, and afterwards, and on or about the 24th day of April, 1856, the said Owen Dunigan and Mary Ann his wife conveyed all their right, title and interest to the plaintiff in this suit, in the corner lot and buildings—said corner lot being in front and rear twenty-five feet, and in depth, on Thirty-fifth street, seventy-seven feet and four inches. That in an action in the superior court, in which Mary Ann Graham was the plaintiff, and James Linden was the defendant, the judgment roll in which was filed on or about the 26th day of December, 1851, the defendant's dower in said property was set off to her, and was and is the whole of the said corner lot and buildings, except one room on the second story back part, and one attic bedroom, and the said defendant now owns her life estate in said corner lot and

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buildings, and receives the rents thereof, except said two rooms aforesaid. The plaintiff further alleged that the taxes on said corner lot for the year 1856, amounting to \$76.60, were due and unpaid, also the taxes for the year 1857, amounting to \$85.60, were due and unpaid, and the taxes for the year 1858, amounting to \$81.51, were due and unpaid, also an assessment for flagging the side-walk on said corner lot, was due and unpaid. The plaintiff alleged that the defendant, by reason of her life estate in said corner lot, was liable to pay and discharge said taxes and assessments during the time the said corner house and lot was in the possession of the defendant, and she was receiving the rents thereof, and that the defendant had paid no portion of said taxes or assessments, although requested so to do. That said taxes and assessments are a lien on the premises hereinbefore mentioned, owned in fee by the plaintiff, subject to the life estate of the defendant; and if the defendant was not compelled by the judgment of this court to pay and discharge said taxes and assessments, the property of the plaintiff would be liable to be sold to pay said taxes and assessments, and thereby the plaintiff deprived of his reversion after the life estate of the defendant had ceased, to the great injury of the rights, interest and estate of the plaintiff in the reversion of said premises, and also of his right and title in and to said two rooms now in the possession of the plaintiff. That the said taxes could not be apportioned and adjusted by the statutes, or without the equitable aid of this court. The plaintiff therefore prayed the aid of this court in the premises, that the defendant might be adjudged to pay and discharge said taxes and assessments, or so much as by right she ought to pay, or that the defendant might be compelled to consent to be paid by the plaintiff a sum in gross, equal to the dower right of the defendant in the whole of said premises at the time of the death of her said husband, and on such payment being made, to release her dower right in said premises; and that a receiver might be appointed to receive the

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rents of said corner house, and out of the said rents to pay and discharge the taxes and assessments aforesaid, and all taxes that might be laid, assessed and imposed thereon, and that the plaintiff might have such other relief as the court might grant, &c. with costs.

The defendant, by her answer, denied the allegations in the complaint contained, except that she admitted her title and occupancy, as tenant in dower, of that part of the premises mentioned in the complaint as so occupied by her; and she prayed the same benefit of her answer as if she had demurred to the complaint.

The issue came on to be tried at a special term, before one of the justices of this court, on the eighth day of April, 1859. The counsel for the plaintiff proceeded to open the case for the plaintiff, and read the complaint, when his honor the judge said the action could not be sustained, upon the facts and allegations stated in the complaint, and the complaint did not state a sufficient cause of action; to which the counsel for the plaintiff excepted. The judge then ordered the complaint to be dismissed, with costs to be paid to the defendant; to which decision and ruling the counsel for the plaintiff excepted, and filed the following exceptions, taken by him to the decision and judgment.

1st exception. For that the court erred in ruling and deciding that the taxes only affected the possession, and were not a lien on the land, and could not affect the plaintiff's reversionary interest. *2d exception.* For that the said judge erred in dismissing the complaint with costs, and refusing to hear proofs in this case.

The plaintiff appealed from the judgment.

H. Brewster, for the appellant.

John Townshend, for the respondent.

Anderson v. Austin.

BY THE COURT. This action could be maintained under the act of 1855, to provide for the due apportionment of taxes and assessments, and for the sale of real estate to pay the same, (*Laws of 1855, ch. 327*;) or it might have been maintained in equity, under the old system of practice.

The complaint shows a state of facts entitling the plaintiff to the relief demanded, so far as relates to the apportionment of the taxes, and that the defendant pay her proportion thereof.

The judgment must be reversed, and a new trial ordered; costs to abide the event.

[NEW YORK GENERAL TERM, May 6, 1861. *Clerke, Ingraham and Sutherland*, Justices.]

ANDERSON vs. AUSTIN.

The words "personal representatives," used in the statute relative to the foreclosure of mortgages by advertisement, passed May 7, 1844, requiring the notice to be served upon the mortgagor or his personal representatives, means "executors or administrators," and not heirs or devisees.

Where there is no personal representative to be served with notice, that provision of the statute is inoperative, and the foreclosure will be good if conducted in the mode otherwise prescribed in the statute.

Where mortgaged premises consist of two or more parcels which had previously been held, used and conveyed together, as one farm, a sale of the whole in one parcel is good.

THIS action was brought by the plaintiff as the assignee of George H. Swords, on the covenant of seisin contained in a deed, dated March 26th, 1853, executed by the defendant Austin to Swords, conveying an undivided half of two pieces of land (composing one farm) in the town of Mount Pleasant, in the county of Westchester. On the 4th of August, 1840, Richard Austin, who then owned the whole of the farm in question, conveyed the same to William Bull in

34	319
2L	424
10h	2
32h	518
32h	520
51h	510

34	319
65h	139

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fee, by warranty deed, duly executed and recorded. At the same time Bull executed and delivered to Austin a mortgage for \$7702.18, to secure the purchase money of the premises, which was duly recorded August 17th, 1840. William Bull died April 15th, 1845, at Sing-Sing; his wife having died before him. He died intestate. On September 1st, 1847, Ann Hunt, a daughter of William Bull, was appointed his administratrix by the surrogate of Westchester county; Isaac Weeks being joined with her at her request. Up to this date no administrator had ever been appointed of the estate of William Bull. William Bull left him surviving four children, viz: Ann, Frances, Mary and Ellen. Ellen died under age, intestate and unmarried. On the 19th day of January, 1846, the said mortgaged premises were sold under a statute foreclosure of said R. Austin's mortgage, and were bought in by the mortgagee for \$9100, and the original mortgage, notice of sale and affidavits, were duly recorded February 2d, 1846. The heirs of Bull were in possession of the premises at the time of the sale, and so continued until April, 1846, when they removed; and then Richard Austin took possession and held it till he died, in September or October, 1847. By his will, dated May 26th, 1847, said Richard Austin devised the premises to his grandson Richard Austin, and to his nephew Henry Austin, the defendant in this action. Said devise is contained in the 7th clause of the will, and is a devise of the residue of the real and personal estate of the testator. There being no executor or administrator of William Bull, when the mortgage was foreclosed by Richard Austin, the foreclosure was made by advertising in a newspaper, published in the county of Westchester, for twelve weeks, and by posting on the outer door of White Plains court house, for the same length of time. The cause was tried at the New York circuit, in April, 1859, before Justice EMOTT, without a jury. The plaintiff objected that the foreclosure was insufficient to cut off the right of Bull's heirs to redeem; but the justice at the trial held that the foreclosure

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was complete, that the title under it was perfect, and that the defendant was entitled to judgment. The plaintiff excepted; and judgment being perfected, he appealed.

Geo. W. Stevens, for the appellant.

Edward Wells, for the respondent.

BY THE COURT. The words "personal representatives," used in the statute respecting the foreclosure of mortgages by advertisement, passed in 1844, (*Laws of 1844, chap. 346, § 2*), means "executors or administrators," and not heirs or devisees.

Where there is no personal representative to be served with notice, that provision of the statute is inoperative, and the foreclosure will be good if conducted in the mode otherwise prescribed in the statute.

When the premises sold consist of two or more parcels which had previously been held, used and conveyed together, as one farm, a sale of the whole in one parcel is good.

Judgment affirmed, with costs.

[NEW YORK GENERAL TERM, May 6, 1861. *Clerke, Sutherland and Ingraham*, Justices.]

HICKOK and STARR vs. BLISS and CAMPBELL.

A temporary absence from the state, without a change of residence, is not the exception contained in the statute of limitations, and does not prevent the running of the statute during such absence.

Where a referee finds that the defendant was absent from the state by *various journeys*, at least one year in the aggregate, during the six years, this is not such a finding of absence as will warrant a judgment against the defendant, who has pleaded the statute of limitations.

APPEAL by the defendant Bliss from a judgment entered upon the report of a referee. The action was brought

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for the recovery of the amount due on two promissory notes with interest, made by the defendants by the firm name of Campbell & Bliss—one of the notes being for \$673.50, due on the 13th day of May, 1852, the other for 398.75, due on the 6th day of June, 1852—and was commenced on the 1st day of February, 1859, by the service of a summons and complaint on the defendant Bliss. The referee found the following facts, viz: That in the month of February, 1852, the defendant Bliss went to San Francisco, in the state of California, and was continually absent from the state of New York until the 6th day of October, 1852, when he returned to the city of New York. That said defendant has ever since said 6th day of October, 1852, been a resident of the state of New York, but has been absent from said state of New York at least one year in the aggregate, by various journeys to the western states, during the years 1853 to 1858. That in September and October, 1851, the defendant Campbell was a minor, under the age of 21 years. That the firm of Campbell & Bliss failed in business in October, 1851, and from that time to October, 1853, the defendant Campbell was insolvent, and a resident of this state. As conclusions of law, the referee found and reported that the plaintiffs were entitled to judgment against the defendant for the sum of \$1575.58, the amount of said notes, with interest thereon from their maturity to the date of the report, besides costs; so far only as that such judgment might be enforced against the joint property of both defendants, and the separate property of the defendant William H. Bliss.

Richard O'Gorman, for the appellant.

Barrett & Brinsmade, for the respondent.

BY THE COURT. Continued residence here for six years is a bar, under the statute of limitations. Temporary absence from the state, without a change of residence, is not the ex-

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ception contained in the statute, and does not prevent the running of the statute during such absence.

The finding of the referee that the defendant was absent from the state by *various journeys* during six years, at least one year, in the aggregate, is not a sufficient finding of absence to warrant the judgment against the defendant.

Judgment reversed, and new trial ordered; costs to abide the event.

[NEW YORK GENERAL TERM, May 6, 1861. *Clerke, Gould and Ingraham, Justices.*]

THE IRVING BANK *vs.* WETHERALD & YOUNG.

A note, made by W. and payable at the Irving Bank, was discounted by the Seventh Ward Bank. Subsequently, W. formed a partnership with D., under the firm name of W. & Co.; whereupon the firm directed the Irving Bank to charge the notes of W., including the one in question, to the account of W. & Co. Prior to the maturity of the note, W. died, and D. directed the Irving Bank not to charge the individual notes of W. to the account of W. & Co. When the note matured, the Seventh Ward Bank, as the owner thereof, presented it to the paying teller of the Irving Bank, who certified it as paid, and charged the amount to W. & Co. who had not enough funds in the bank to pay it, and W. had no funds there. The Seventh Ward Bank stamped the note "paid." On discovering the mistake of its teller, in certifying the note, and before three o'clock of the same day, the Irving Bank notified the Seventh Ward Bank of the mistake, and requested that the certificate be canceled, which was refused. The Irving Bank then paid to the Seventh Ward Bank the full amount of the note and received the same back, stamped "paid." On the same day, and before three o'clock P. M., the note was again presented at the Irving Bank and payment demanded, and was protested for non-payment, and notice thereof given to the indorsers. *Held* that the note was not to be deemed paid, and that the Irving Bank could maintain an action thereon, against the indorsers.

THIS was an action against the defendants as indorsers of a promissory note. The cause was tried at the New York circuit before Justice JAMES, without a jury. The court found the following facts: That the plaintiffs are a

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banking association duly organized under the laws of the state of New York. On the 7th day of December, 1858, one Morris Wilson made his note for \$304.30, at eight months, payable at the Irving Bank to his own order; that he indorsed the same, and it was also indorsed by Wetherald & Young, the defendants. That said note, before maturity, was duly discounted by the Seventh Ward Bank for the defendants. That after making said note, the said Morris Wilson entered into copartnership with one Davidson under the firm name of Morris Wilson & Co., after which said Wilson closed his account with said Irving Bank, and opened there an account in the firm's name, and the said firm thereupon directed the said Irving Bank to charge the notes of Morris Wilson, including the note in suit, as they matured, to the account of Morris Wilson & Co. That prior to the maturity of said note Morris Wilson died; that after his death, and before the maturity of the note, Davidson, the partner of Wilson, directed the Irving Bank not to charge the individual notes of Morris Wilson to the account of Morris Wilson & Co. That on the day the aforesaid note matured the Seventh Ward Bank, as the owner thereof, presented it to the paying teller of the Irving Bank, who certified it in the usual manner as paid, and charged the same in the books of the Irving Bank thus—"Aug. 10, 1859, Morris Wilson & Co. \$304.30;" that at this time Morris Wilson had no funds in the bank, and Morris Wilson & Co. had but \$246.43 to their credit. That immediately upon said note being returned to the Seventh Ward Bank, certified, that bank caused the same to be stamped across the face, "Seventh Ward—Paid at the bank." Also, written across the face the initials J. W. H., being those of the paying teller of the Irving Bank. That upon the discovery by the officers of the Irving Bank of the mistake of their paying teller in certifying said note, and before three o'clock of the same day, the said Irving Bank notified the said Seventh Ward Bank of the mistake, and requested the certificate to be canceled, which the Seventh

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Ward Bank refused. That upon the refusal of the Seventh Ward Bank to cancel said certificate, the Irving Bank paid to said Seventh Ward Bank the full amount of said note and received the same into their possession stamped "paid" as aforesaid; and thereupon, on the same day of its maturity, and before three o'clock P. M., the same was again presented at the counter of the Irving Bank for payment, payment demanded, and the same duly protested for non-payment, and notice thereof given to the defendants. That the amount due upon said note for principal, protest and interest, was \$313.38. The following were the conclusions of law: *First.* That the certificate of the paying teller of the Irving Bank was not an actual payment of the note. *Second.* That the notice to the Seventh Ward Bank of the mistake under which the certificate was made, exonerated the Irving Bank from all liability upon such certificate. *Third.* That the subsequent payment of the note by the Irving Bank, without compulsion of law, or legal obligation, or previous request from makers or indorsers, satisfied and discharged said note.

The court directed judgment for the defendant for a dismissal of the complaint, with costs of the action. The plaintiff excepted separately to each of the conclusions of law, and to all of said conclusions; and appealed from the judgment.

C. L. Monell, for the appellant. I. The judge erred in deciding that the notice to the Seventh Ward Bank, of the mistake under which the certificate was made, exonerated the Irving Bank from all liability upon such certificate. The learned judge, in his opinion, says: "The certificate of the paying teller of the plaintiffs' bank, in legal effect, charged them with the payment of the note," but that they could exonerate themselves by giving notice of the mistake. The case of the *Canal Bank v. Bank of Albany*, (1 Hill, 287,) cited in support of this proposition, was a case of payment by the plaintiffs to the defendants of a draft, upon which the

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payee and first indorser's name was *forged*. The court held the money could be recovered back; that though the defendants were innocent of any intended wrong, they had obtained money of the plaintiffs *on an instrument to which they had no title, and were therefore bound to refund*. And the case of *Wilkinson v. Johnson*, (3 Barn. & Cres. 428,) was a similar case of payment of draft with forged indorsements. In the case before the court, the Seventh Ward Bank had a perfect title to the note; it had discounted it for the defendants, and at the time it was certified was the owner of it. The certificate of the paying teller of the Irving Bank was equivalent to payment, and only fraud on the part of the Seventh Ward Bank could discharge the obligation of the former bank. It is customary for banks to certify, instead of paying at the time, and to pass certified paper through their exchanges the next day. It is also the custom of banks holding such certified paper to stamp or mark them "paid," and to charge the amount to the certifying bank. In *Farm. and Mechanics' Bank of Kent Co. v. Butchers and Drovers' Bank*, (16 N. Y. Rep. 125,) the court say: "This obligation [i. e. certifying a check] is substantially the same as that assumed by the acceptor of an ordinary bill of exchange, and the bank is liable as acceptor." Story says, (*Story on Bills*, § 252,) when an acceptance is once made, if the bill has been delivered to the holder, the transaction is complete, and the acceptance is *irrevocable*. And so Chitty (*Chitty on Bills*, 308) says: "A complete acceptance, communicated to the holder, is not revocable." The note in this action having been made payable at the Irving Bank, was certified by them, and returned to the Seventh Ward Bank, the holder. The Irving Bank could not afterwards revoke its certificate. (*Edwards on Bills*, 434.)

II. The judge erred in deciding that the subsequent payment of the note by the Irving Bank, without compulsion of law, or legal obligation, or previous request from makers or indorsers, satisfied and discharged the note. If it has

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been sustained upon principle and authority, that the plaintiff could not exonerate itself from liability upon its certificate, then this second proposition falls. The payment of the money to the Seventh Ward Bank did not affect the rights or the position of the parties in respect to this paper. The marking of the stamping hammer "paid," was not a payment. (*Scott v. Betts, Lalor's Hill & Denio*, 363.) The payment of the money on the day of the maturing of the notes, after the certificate, but during business hours, was merely a discharge of the previous obligation to pay, and enabled the plaintiffs to cancel their certificate, present the note for payment, and give notice of non-payment to the indorsers, (the defendants.) In treating this as a payment of the note, the learned judge assumes that it was owed by the bank either as a stranger, or as the agent of the maker. The relation which exists between a depositor and a bank is not that of a principal and agent, but of debtor and creditor. (*Chapman v. White*, 2 *Seld.* 412.) There was, therefore, no obligation on the part of the bank to certify the note. But having certified it, by mistake, the bank had a right to take it as purchaser, and did so purchase the note on the day of its maturity, and is, therefore, entitled to maintain this action.

III. By the transaction between the plaintiff and the Seventh Ward Bank, the plaintiff became the *purchaser* of the note before maturity, and was entitled to all the rights of the Seventh Ward Bank. The note was payable at the plaintiff's bank. At the time it was certified and returned to the Seventh Ward Bank, the latter bank did not know of any want of funds. *Non constat*, it might have been certified for the *honor* of the maker, and the Seventh Ward Bank having received the acceptance of the plaintiff, acquired additional security, of which it could not be deprived. In *Watervliet Bank v. White*, (1 *Denio*, 608,) the facts were these: The note of White, payable at the Watervliet Bank, was held by the Farmers and Mechanics' Bank of Albany.

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At maturity it was sent to the Watervliet Bank, and the amount credited to the Farmers and Mechanics' Bank, and charged to the maker, although he had no funds in the bank. Suit was brought against the *maker, on the note*. The court say: "The Watervliet Bank was a stranger to the making and negotiation of the note, and to the parties, and having paid it to the holders, *took it as a purchaser*, and acquired their rights, and is entitled to the same remedies which the holders had, to sue and collect the amount due upon it." Again: "The Watervliet Bank took the note as purchaser from the Farmers and Mechanics' Bank, and having become such, after or at the time it became payable, the utmost that can be claimed as against them, is that they took the note subject to such defense as could have been made against it by the parties to it, in the hands of the Farmers and Mechanics' Bank." It appeared in that case, that the note was charged to the maker's account by the Watervliet Bank, and marked "paid," and that it was the practice of the bank, when notes were charged to the account of the maker, to stamp them, whether they were paid or not. In *Troy City Bank v. Grant*, (*Hill & Denio*, 119,) the facts were precisely the same as in the case now before the court. Grant was the indorser of a note held by the Troy City Bank, and payable at the Bank of Troy. At maturity, the note was presented at the Bank of Troy for payment. By mistake the bank "noted it as good," credited it to the Troy City Bank, and charged it to the maker. The next morning the mistake was discovered, and notice of non-payment of the note given by the Bank of Troy to the indorsers. The Troy City Bank, the holder, refused to cancel the credit, but *allowed* the action to be brought in its name, for the benefit of the Bank of Troy. The defendant moved for a nonsuit, on the ground that the note had been paid by the Bank of Troy, which was refused. The plaintiff had a verdict. A new trial was denied. The court say: "There can be no question about the correctness of the ruling in this case." And, again: "The

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truth is, that the payment under the circumstances disclosed and relied on, in judgment of law, was no payment at all; and we must regard the case, and test it by principles, wholly irrespective of this consideration; and then the recovery stands upon unquestionable authority." If it was not a payment, then clearly the transaction between the plaintiff and the Seventh Ward Bank was a *purchase*, within the authority of *Watervliet Bank v. White*, (*supra*.) In the case of *Crosby v. Grant*, (36 N. H. Rep. 273,) the note was taken from the bank by the plaintiff, within bank hours, *on the last day of grace*, he paying the full consideration for it. The plaintiff had no previous connection with the note. This was held to be a purchase before maturity, and not subject to the equities between maker and payee. In no aspect of the case can this be considered a payment of the note, as between any of the parties. The whole transaction shows that it was the intention of the Irving Bank *not* to pay it; for when they discovered the mistake of their teller, they immediately advanced the money, and took the note, presented it for payment, and gave notice to the indorsers. It is very different from the case of a voluntary payment of a debt of a third party, made without request or legal obligation.

Sherwood & Story, for the respondent. I. The answer avers, the proof shows, and the court found the fact that the note was *paid* to the Seventh Ward Bank, while the Seventh Ward Bank was the lawful owner of it. By that *payment* the defendants became discharged.

II. The Irving Bank certified the note, by which it supposed it was liable to pay it to the Seventh Ward Bank. The Seventh Ward Bank regarded the Irving Bank as liable to pay it, and refused to release it from that liability, in the only way in which either supposed it could be done, whereupon the Irving Bank *paid* the note.

III. Whether or not the plaintiff was under legal obligations to pay the note to the Seventh Ward Bank, having

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paid it without request of the defendants, the plaintiff cannot recover of them. (*Ingraham v. Gilbert*, 20 Barb. 151.)

BY THE COURT. If the judge was right in finding that the plaintiff was exonerated from liability to the Seventh Ward Bank, by the notice of the mistake, then the note was valid in the hands of the Seventh Ward Bank, and consequently of any other party to whom it was transferred.

The subsequent demand and notice of protest was good, and enured to the benefit of the plaintiff.

If the Irving Bank had refused payment, and the Seventh Ward Bank had sued and recovered on it, such recovery would not have been a payment to relieve the parties, but would merely operate to transfer the title to the plaintiff on payment of the judgment.

Judgment reversed, and new trial ordered; costs to abide the event.

[NEW YORK GENERAL TERM, May 6, 1861. *Clerke, Gould and Ingraham, Justices.*]

JOHN E. SEARS vs. JOSEPH CONOVER.

A contract upon which an action would lie by the personal representatives of a party thereto, in case of his death, for the enforcement of his rights and remedies under the same, is legally assignable.

So held in respect to a written agreement by the defendant to deliver to the plaintiff's assignor all the potatoes the defendant should raise the following season, delivered on the boat, at a specified price per barrel.

A notice given by the assignee of such a contract, to the vendor, that he is ready to pay for the potatoes, on delivery, according to the terms of the contract, is a sufficient notification of readiness on his part.

And if the vendor, at the time of receiving such notice, and with knowledge of the assignment of the contract, refuses to deliver the potatoes, stating that he has sold them to other persons, this will supersede the necessity of any demand after the potatoes are harvested.

If the vendor has sold and delivered the potatoes to other parties, without

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any notification to the original purchaser, or his assignee, of the time when he would be prepared to deliver them, or requiring him to be prepared to receive and pay for them, and the jury has found for the assignee, generally, in an action brought by him upon the contract, the last sale will be held to have been made in pursuance of the intention manifested by the refusal to deliver the goods to the assignee or to recognize him in the transaction.

THE action in this cause was brought upon the following contract.

“Mr. J. Conover agrees to deliver to S. B. Conover all the peach-blow potatoes he raises the coming season, in good merchantable order, delivered on the boat at 12s. per barrel. He agrees to plant ten acres or more. *New York, March 6th, '57.*

JOSEPH CONOVER.

New York, March 6th, 1857.

I have this day agreed to take of Joseph Conover, of Middletown, N. J., all the peach-blow potatoes he raises the coming season, at the price of one dollar and fifty cents per barrel, delivered at the boat at Red Bank. He to plant ten acres or more.

STEPHEN B. CONOVER.”

The plaintiff sued as the assignee of Stephen B. Conover's interest in the contract; alleging that in October, 1857, he purchased the said contract for a good and sufficient consideration from the said Stephen B. Conover, and that he, the plaintiff, is now, and has been since the said purchase, the owner of the said contract, and entitled to all the rights and interest therein which the said Stephen had. And it was proved that written notice of said assignment was given to the defendant, on the 5th of October, 1857. At the same time a demand of the potatoes was made by the plaintiff, of the defendant, the same to be delivered on board the boat in accordance with the terms of the contract; the plaintiff stating in the notice, his readiness to pay for the potatoes, on delivery, at the price named in the agreement. The witness who served the notice testified that he met the defendant, and told him that he had come to see about the potatoes, and that he had a paper for him; he said, “I told you when

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you were here before that you could not have the potatoes; that I had sold them; and I tell you so again." The witness read the notice to him; he said that he did not know John R. Sears, and had made no contract with him.

The action was brought for this refusal of the defendant to deliver the potatoes. It was proved that potatoes at the time of harvesting were worth that year, (1857,) at Red Bank, from \$3.75 to \$3.87½ per barrel.

The defendant moved to dismiss the complaint; which motion was denied, and the defendant excepted.

The court decided that the plaintiff was the assignee of the contract, and that the contract was a valid and binding contract of bargain and sale.

The jury found a verdict in favor of the plaintiff, for five hundred dollars.

The defendant made a case, and a motion for a new trial having been made, at a special term and denied, he appealed to the general term.

Beebe, Dean & Donohue, for the appellant.

T. D. Pelton, for the respondent.

BY THE COURT. The personal representatives of Stephen D. Conover would have been entitled to enforce all his rights and remedies under the contract in question. It is therefore legally assignable.

The notice given by the plaintiff to the defendant, on the 5th October, 1857, that he was ready to pay for the potatoes on delivery, according to the terms of the contract, was a sufficient notification of readiness on his part.

The statement of the defendant at that time, when fully informed of the assignment of the contract, that he would not deliver the potatoes, and that he had sold them to other parties, superseded the necessity for any demand for delivery, after the potatoes were harvested, if the jury considered the

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fact of the refusal to perform to be established. There was some contradictory evidence on this point, but it must be now held that it was decided by the jury.

The defendant should have notified the plaintiff of the time when he would be prepared to deliver the potatoes at the place agreed on, and have required him to be prepared to receive and pay for them. Had the plaintiff neglected to comply, the defendant would then have been absolved from performance.

The defendant having sold and delivered the potatoes to other parties, without such notification to the plaintiff, and the jury having found for the plaintiff generally, such sale must now be held to have been made in pursuance of the intention manifested by the refusal to deliver on the fifth of October, or to recognize the plaintiff in the transaction.

On the question of damages, the evidence established that the defendant had not harvested more than 150 bushels of potatoes suitable for delivery under the contract, or that the other contracting party could have been required to receive. The answer admits, however, 200 bushels.

A new trial is granted unless the plaintiff stipulate to reduce the verdict to \$300, within ten days; and in the event that such stipulation is filed, then the judgment is affirmed.

[NEW YORK GENERAL TERM, May 6, 1861. *Clerke, Leonard and Sutherland*, Justices.]

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SKINNER vs. TINKER.

An action can be sustained, in our courts, on a contract made in Cuba, although not stamped as required by the laws of Cuba.

A partnership that has no limit in respect to time, may be dissolved by either partner, at any time; but such a dissolution will not deprive the other party of any claim for damages which he has sustained prior to the dissolution. Nor would he be authorized to incur new expenses or liabilities in order to carry out the partnership, after notice of dissolution.

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Where a party to an agreement gives notice to the other, of his determination not to perform the same, on his part, performance by the party receiving such notice becomes unnecessary.

On receiving such notice, the party is entitled to damages, if any have been sustained, up to that time, but not to prospective damages.

ACTION to recover damages for breach of a contract, for the formation of a partnership. The plaintiff, a dentist of Brooklyn, and the defendant, a dentist of Havana, Cuba, entered into a written agreement at the latter place, March 12, 1853, by which they were to prosecute dentistry, as partners, at Havana; to begin some time in October or November thereafter, if plaintiff should present himself. The agreement was silent in regard to the duration of the partnership. Thereupon the plaintiff sold out his business at Brooklyn to Dr. Marvine, and entered into bonds not to resume practice there, and made all preparations for carrying out his agreement. After this, and on the 15th day of May, 1853, he received a letter from the defendant declining to carry out the agreement on his part. Other letters followed. The plaintiff nevertheless went to Cuba, arriving there December 15, 1853, and offered to perform the agreement, but the defendant refused, referring the plaintiff to his letters. The plaintiff returned home, but did not resume practice. The plaintiff claims that he sustained large damage by reason of the defendant's violation of the agreement. On the trial at the circuit the plaintiff proved the agreement, his sale of his business at Brooklyn &c., the defendant's refusal to perform, the plaintiff's readiness and offer to perform, and the damages the plaintiff had sustained by reason of the defendant's violation of the agreement. The defendant moved to dismiss the complaint, on three grounds, viz: 1. That the contract was incomplete on its face, and contemplated other and further provisions before it could be binding upon either of the parties, and was therefore an imperfect agreement and void. 2. That it was not written on stamped paper, and being a

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Cuban contract, was controlled by the laws which govern that island, which require a government stamp. 3. That the plaintiff did not present himself to the defendant at the time stipulated in the alleged contract. The court denied the motion on each of the above points, and the defendant excepted.

The jury rendered a verdict in favor of the plaintiff, and assessed his damages at \$4000. Judgment was suspended, until the exceptions taken should be reviewed at a general term of the court.

L. R. Marsh, for the plaintiff.

P. Y. Cutler, for the defendant.

By the Court, INGRAHAM, J. It is not necessary to decide whether the contract on which this action was brought was void here for want of a stamp, under the laws of Cuba. The case of *Ludlow v. Van Renssaelar* (1 John. 94) would sustain a recovery in our courts, on the contract, although not stamped. (See also *Andrews v. Herriot*, 4 Cowen, 508, n.)

A partnership that has no limit in respect to time may be dissolved by either partner, at any time, (*Chit. on Con.* 208;) but such dissolution would not deprive the other party of any claim for damages which he might have sustained prior to the dissolution; nor would he be authorized to incur new expenses or liabilities in order to carry out the partnership, after notice of dissolution. (See *Skinner v. Dayton*, 19 John. 538.)

Performance on the part of the plaintiff, by appearing in Havana in October or November, as stated in the contract, was unnecessary, because the defendant had given notice of his determination not to form the partnership. The plaintiff was then entitled to damages, if any were sustained, up to that time, but not to prospective damages.

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These are all the exceptions, and we can review nothing else, in this case.

Judgment should be ordered for the plaintiff on the verdict, with costs.

[NEW YORK GENERAL TERM, May 6, 1861. *Clerke, Ingraham and Sutherland*, Justices.]

HAMILTON MURRAY, President of the City Bank, *vs.* FREELAND T. BARNEY, LESTER S. HUBBARD, WILLIAM DURBIN and others, impleaded with Henry Fitzhugh, De Witt C. Littlejohn and others.

THE SAME *vs.* THE SAME.

Where the terms of an agreement alleged to be usurious are doubtful and depend upon conflicting evidence, the supreme court will not review the general conclusion of the referee in favor of the validity of the loan.

It is the province of the referee to find the facts, so far as they are deemed necessary to enable the court to pass upon the questions which the appellant desires to review on the appeal.

It cannot be assumed, without proof, that a bank makes a profit by selling exchange on New York city at one-half of one per cent. But when it is shown that the sale of exchange is a profitable business, and it is a part of the agreement that the borrower shall buy a bill of exchange, as the condition of the loan, the transaction is usurious.

Otherwise, where there is no valid agreement of the kind; but merely an expectation that the borrower will purchase a bill of exchange with which to pay his note, when it afterwards matures in the city of New York. *Semble.* The defendants, F. and L., after executing two mortgages to secure the plaintiff's claims, conveyed the mortgaged premises, by deed with covenants of warranty, to H. Fitzhugh, jun., but without consideration. They subsequently took back two mortgages from H. Fitzhugh, jun. to secure the payment of over \$30,000; and afterwards, when they failed, executed an assignment of certain property, including their own mortgages to the plaintiff and the two mortgages from H. Fitzhugh, jun., to the defendants, Barney, Hubbard & Durbin; subject to the payment of the plaintiff's demand in this action. In order to carry out and perfect this assignment, H. Fitzhugh, jun. conveyed the mortgaged premises, by quit-claim deed, to B., H. and D.; *Held*, that B., H. and D. could not claim the benefit of the covenants of

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warranty in the deed from F. and L. to Henry Fitzhugh, jun., so as to contest the plaintiff's mortgages on the ground of usury; but they must be regarded merely as assignees of F. and L., taking the whole beneficial interest in the premises, subject to the payment of the mortgage debt.

The condition of a mortgage may provide for future advances, and specify a *certain sum* sufficiently large to cover the amount of the floating debt intended to be secured thereby. *It seems*, however, that as against creditors or subsequent purchasers without notice, the condition of a mortgage cannot be extended by a contemporaneous or subsequent parol agreement, so as to embrace a debt not within its very terms.

BOTH of these actions were brought to foreclose a mortgage executed by Fitzhugh and Littlejohn to the City Bank of Oswego, upon different pieces of land, to secure the same demand, and were tried together. The condition was the same in both, and was as follows: "This grant is intended as a security for the payment of the sum of fifty thousand dollars loaned and advanced by the said City Bank to the said Fitzhugh & Littlejohn on notes, drafts and checks, and also for the payment of any money or moneys that may hereafter be loaned or advanced by the said bank to the said Fitzhugh & Littlejohn, on notes, drafts and checks or otherwise, when the same shall become due and payable, (not exceeding the sum of fifty thousand dollars.)"

The defendants Fitzhugh & Littlejohn appeared, and claimed that they had paid the notes and drafts specified in the mortgage. The defendants Barney, Hubbard and Durbin, (the present owners of the mortgaged premises,) appeared and set up the defense of usury. Both causes were referred, together, to Judge MULLIN, who reported in favor of the plaintiff.

In his fourth finding of fact the referee specifies three drafts and one note of Fitzhugh & Littlejohn, which remain unpaid; and *Fifth*. That the aforesaid drafts and notes are held and owned by said City Bank, and have not been paid by said Fitzhugh & Littlejohn, and the balance unpaid thereon is secured and covered by said mortgages. *Sixth*. There has been paid to said bank by said Fitzhugh & Littlejohn,

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in reduction of the amount of said securities, including interest, the sum of \$5135.24. *Seventh.* That there is due and unpaid on said securities, and to be collected on said mortgages, the sum of \$10,888.72, for which the said plaintiff is entitled to judgment, with interest from the 30th day of June, 1859.

And upon the findings of facts the referee found as conclusions of law, *First.* That said mortgages cover the amount due on said drafts and notes, and that the plaintiff is entitled to foreclose said mortgage for such amount. *Second.* That the plaintiff is entitled to judgment of foreclosure, against all of the defendants except Folger, Cobb and Lawrence, for the sum of \$10,888.72, with the interest thereon from June 3d, 1859, with costs.

The defendants in this action excepted to the findings of fact, conclusions of law and rulings of the referee, as follows, to wit: "*First exception.* The defendants except for that the said referee has found and reported as matter of fact, that the drafts and notes mentioned and described in his fourth finding of fact aforesaid, were discounted by the City Bank, and the proceeds credited to the firm of Fitzhugh & Littlejohn; whereas said referee should have reported that the drafts and notes were discounted by the said City Bank, under an usurious agreement and at a usurious rate of interest, and that said bank imposed as a condition to the discounting of the same, that the said Fitzhugh & Littlejohn should, with the avails and proceeds thereof, purchase a draft of the said bank on the city of New York, at the usurious rate of exchange or interest, by reason whereof the said securities became void.

Second exception. The said defendants except to the fifth finding of fact of the said referee, wherein he finds that the said drafts and notes held and owned by the said City Bank, and the balance unpaid thereon, is secured and covered by said mortgages; whereas the referee should have found and reported that the said drafts and notes were usurious and void, and that the said mortgages were also usurious and void.

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Third exception. The said defendants except to the sixth finding of fact, that there is due and unpaid on said securities, and to be collected on said mortgages, the sum of \$10,888.72, for which the said plaintiff is entitled to judgment, with interest from the 3d day of June, 1859; whereas the said referee should have found and decided that there was nothing due, at the time of the commencement of this action, on the said notes and drafts or the said mortgages.

Fourth exception. And the said defendants except for that the said referee has not found in his report that there was nothing due to the said plaintiff from the said Fitzhugh & Littlejohn, upon said drafts and notes, or mortgages; and to each and every of the findings of fact of the said referee.

Fifth exception. And the said defendants except for that the said referee has found as conclusion of law, that the said mortgages cover the amount due on said drafts and notes, and that the plaintiff is entitled to foreclose said mortgages for such amount; whereas he should have held and decided that said drafts, notes and mortgages were usurious and void.

Sixth exception. And the said defendants except for that the said referee has held and decided as a conclusion of law, that the plaintiff is entitled to judgment of foreclosure against the said defendants, for the sum of \$10,888.72, with interest from June 3d, 1859; whereas he should have held and decided that the said defendants were entitled to a dismissal of the complaint, with costs.

Seventh exception. The defendants except to each and every of the findings of fact and conclusions of law of the said referee."

The facts appearing in the case, except as above, are sufficiently stated in the opinion of the court.

Judgment of foreclosure having been entered upon the report of the referee, the defendants Barney, Hubbard and Durbin appealed to the general term.

Murray v. Barney

B. D. Noxon, for the appellants.

H. A. Foster, for the respondent.

By the Court, MORGAN, J. This is an appeal from a judgment for the foreclosure of two mortgages, entered up on the report of a referee. There were two suits, one to foreclose each mortgage; and as both were given for the same consideration, the pleadings and evidence are the same in both cases. The mortgages were executed by Henry Fitzhugh and De Witt C. Littlejohn and their wives, to the plaintiff; and both were conditioned to pay "the sum of fifty thousand dollars, loaned and advanced by the said City Bank to the said Fitzhugh & Littlejohn, on notes, drafts and checks, and also for the payment of any money or moneys that may hereafter be loaned or advanced by the said bank to the said Fitzhugh & Littlejohn on notes, drafts, checks or otherwise, when the same shall become due and payable, (not exceeding the sum of fifty thousand dollars.)"

They bear date May 5, 1857, and were acknowledged on the 24th day of June, 1857, and recorded the next day in Oswego county, where the mortgaged premises are situated.

The defendants above named state in their answer, that Fitzhugh & Littlejohn, with their wives, on the 19th day of October, 1857, executed and delivered to Henry Fitzhugh, jun. a deed of conveyance of the premises in question, with covenants of warranty against all claims, liens and incumbrances, and for quiet enjoyment; and that on the 24th day of November, 1857, Henry Fitzhugh, jun. sold the same to these defendants, who are in possession. The consideration of the deed from Fitzhugh & Littlejohn to Fitzhugh, jun. is not stated in the case, so far as I have been able to discover. The sale from him to Barney, Hubbard and Durbin, was by quit-claim; and young Fitzhugh states, in his evidence, that he in fact received no consideration from them, and gave no bond on his purchase from Fitzhugh & Littlejohn; but was

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to have what the premises brought, over the debt. What particular debt is not stated, although it may be inferred that he was to have what the premises finally sold for, over incumbrances. He further says, that when he took the deed from Fitzhugh & Littlejohn they owed him two or three thousand dollars for services ; but it does not appear that this indebtedness was any part of the consideration of the conveyance.

On the 25th day of November, 1857, the next day after the conveyance from Henry Fitzhugh, jun. to these defendants, but on the same day it was acknowledged, Fitzhugh & Littlejohn having become embarrassed and unable to pay their debts, made an assignment to these defendants to secure to them the payment of twenty-five thousand dollars, exclusive of interest, for which they held their drafts. The assignment transfers to them, among other property, *two certain mortgages of Henry Fitzhugh, jun.*, executed to Fitzhugh & Littlejohn, October 14 and 19, 1857, one for the sum of thirty thousand dollars, and the other for the sum of three thousand dollars. These mortgages appear to cover the same premises. They also assign to these same defendants *their own mortgages*, to foreclose which these suits are brought ; and conclude with a power of attorney authorizing these defendants to perform all acts necessary to the collection of the mortgages aforesaid.

I think it might be inferred that the deed from Fitzhugh & Littlejohn to Henry Fitzhugh, jun., was voluntary ; and that the quit-claim from Henry Fitzhugh, jun. to these defendants, was made to perfect the assignment to them, and at the request of Fitzhugh & Littlejohn ; but there is no explanation of these transactions to be found in the case, either from the pleadings, evidence or findings of the referee.

These defendants, however, after stating that they are purchasers of the premises in question, claim, in their answer, that the notes and drafts which constitute the alleged indebtedness from Fitzhugh & Littlejohn to the City Bank, covered by the terms of the two mortgages in question, are

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void for usury ; being renewal notes and drafts given to take up other paper which the bank discounted under an usurious agreement, by which the bank exacted a premium (by way of selling exchange on New York,) of one half of one per cent over and above the regular rates of interest or discount thereof.

There is no finding of facts by the referee by which we know the terms of the alleged usurious agreement ; or whether the notes and drafts established on the trial, were renewals of prior notes and drafts alleged to be usurious. I suggested, on the argument, to the learned counsel for the appellants, that the case was defective in this respect ; but the counsel for both parties thought the difficulty could be obviated by consent ; and that it was only a matter of form, which might be waived. The only way to avoid the difficulty is for this court to attempt to ascertain from the evidence, which is very voluminous, what the agreement was under which the original note and drafts were discounted by the City Bank ; and whether the note and drafts established on the trial were renewals of the originals. This would impose upon the court a burdensome task, and substitute a new tribunal for the determination of facts. It was the province of the referee to find the facts in this case, so far as they were deemed necessary to enable this court to pass upon the questions which the defendants desired to review on this appeal. The defendants except to the report of the referee, because it fails to find an usurious agreement ; and because it fails to find that the note and drafts, as well as the mortgages, were usurious and void. On looking into his findings, there is nothing said about it one way or the other, except the general conclusion that there is due and unpaid on said securities the sum of \$10,888.72, for which the plaintiff is entitled to judgment.

Now it may be asked, what was the agreement ? The argument of the defendants' counsel does not claim that in a single transaction it would be usurious for the bank to require a note to be made payable in the city of New York ;

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but it is insisted that here was a line of discounts and renewals for several months, on thirty days paper ; and drafts purchased at each renewal, giving the bank a premium of one half of one per cent for the difference in exchange ; and that it is usurious on the face of the transaction. This proposition assumes that the proof shows that the notes and drafts were mere renewals of former notes and drafts. On looking into the case, however, there is considerable evidence which tends to disprove the proposition which is relied upon to make out a case of usury. It was by no means a common thing for Fitzhugh & Littlejohn to pay old paper with the proceeds of new drafts, which are alleged to be renewals. They were engaged extensively in the purchase of grain, and other business, and had large dealings with other banks, which gave them funds in New York, out of which most of this paper was paid. I do not think the evidence necessarily tends to establish the proposition of the learned counsel for the defendants on this appeal. If, therefore, the referee has refused to find it, we cannot say that he erred in his conclusions of fact. My own opinion is, that if the defendants intended to raise the question of usury, they should have obtained a special finding of the referee, setting forth the agreement under which the debt in question was created ; or should have requested him to find it, and excepted to his refusal. (22 *N. Y. Rep.* 323. 5 *id.* 571.)

Although we have the power to reverse a judgment for error of fact, and to examine the evidence with a view to test the correctness of the conclusions to which the referee has come, we have no power to substitute a special finding of facts in the place of the facts found by the referee. On appeal to the court of appeals, that court will not regard any finding of facts, except such as shall be stated by the referee, according to the provisions of the code. (*Mills v. Thursby*, 12 *How.* 417.)

All that we know in this case is, that the referee has found in favor of the validity of the paper alleged to be usurious.

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We do not know what conclusion he came to as to the agreement under which the paper was discounted. If there was a usurious agreement which would invalidate the paper, it is to be inferred from a mass of evidence, which involves the transactions of Fitzhugh & Littlejohn for many months, to the amount of more than a million of dollars. I have looked into the case to see if I could trace back the note and drafts in question to any time when the bank entered into an arrangement by which Fitzhugh & Littlejohn agreed to purchase exchange on New York before or at the maturity of the drafts, with which to pay them ; and I have been unable to discover such an agreement. True, they did purchase exchange on New York at various times ; and possibly there was some understanding that the bank was to obtain a benefit in this way, for discounting the paper in question. But I am inclined to the opinion that it was not imposed upon Fitzhugh & Littlejohn as a condition of the discount. At all events, I do not think we can infer such an agreement, against the conclusions of the referee. It is unnecessary to decide whether such an agreement, if found, would constitute a case of usury within the decision of the court of appeals, in *Lee's Bank v. Walbridge*, (19 N. Y. R. 134.)

There is no proof, as I can discover, to show what profit the bank made by selling exchange on New York. Before we could determine that the bank obtained a benefit from the sale of exchange, it would seem to be necessary to show what in fact the profit amounted to ; unless we are permitted to assume that the one half of one per cent was clear profit ; which I think is not to be assumed without evidence. If there is no legal difference in the value of money, whether in New York or Oswego, the advantage which the bank obtained by selling exchange may perhaps, without proof, be regarded as merely incidental ; and in fact may prove to be a losing, rather than a remunerating business. If it is not usury for a bank to require payment in New York of its discounted bills in a single transaction, it would be difficult to

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maintain the proposition that usury could be predicated upon a series of transactions of the same kind. If it is shown that the sale of exchange was a profitable business, there would seem to be good ground for alleging usury where it was part of the agreement that the borrower should buy a bill of exchange as the condition of the loan. Where, however, there is no valid agreement of the kind, but merely an expectation that the borrower will probably purchase a bill of exchange of the bank when his note matures in New York, I should think the transaction would not be considered usurious. But it is unnecessary to pass upon this question in this case ; for we cannot say, in opposition to the finding of the referee, that the evidence shows that the loans in question were made to Fitzhugh & Littlejohn upon any such conditions. Certainly it could hardly be claimed that Fitzhugh & Littlejohn put themselves under any obligation to purchase bills of exchange on New York, with which to pay these notes and drafts. If they did so, there were a great many occasions when they neglected to make the purchase for that purpose. It is said, however, that in order to cover up and conceal the real transaction, Fitzhugh & Littlejohn used other funds in New York to pay these loans ; and then supplied the deficiency with bills of exchange which they subsequently purchased of the City Bank. It would require considerable presumption to make out such a case ; and as the referee has not succeeded in detecting the subterfuge, I think this court ought not to indulge in the presumption, contrary to the conclusion of the referee. Indeed, it is not at all probable that there was any such understanding between the bank and Fitzhugh & Littlejohn. That such might be the effect of a series of loans of the kind in question, may have been foreseen by both parties ; but in the absence of any agreement of the kind, Fitzhugh & Littlejohn were under no obligation to buy exchange of the City Bank in order to pay their notes and drafts in New York city. They might pay in New York with currency ; or buy exchange elsewhere for that purpose ; or allow

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their paper to go to protest and pay it in Oswego. I do not see a single instance where they were required to buy bills of exchange of the City Bank. It would therefore be contrary to the intendment of the law, in such a case, for this court to presume that there existed an usurious agreement of the character suggested.

In my opinion there is nothing in the case which would authorize this court to reverse the judgment against the finding of the referee, on the question of usury.

But if there was sufficient evidence to make out a case of usury, it is very questionable whether *Barney, Hubbard and Durbin* are in a position to avail themselves of the defense. *Fitzhugh & Littlejohn*, who have a right to waive the defense, have done so by omitting to plead usury in this case. It is admitted that where the vendee of lands takes the lands subject to the usurious security, he cannot defend against it. (9 *Paige*, 145.) But it seems that the borrower may transfer to his purchaser the premises in such a way as to invest the purchaser with a right to defeat the usurious security. In this case, *Fitzhugh & Littlejohn* conveyed the premises to young *Fitzhugh*, with covenants of warranty against the incumbrance of the two mortgages in question; and young *Fitzhugh* afterwards quit-claimed to *Barney, Hubbard and Durbin*. If the conveyance had been genuine, and if it had appeared that young *Fitzhugh* was a purchaser for value, I should incline to the opinion that he could have defended against the mortgages; and that perhaps *Barney, Hubbard and Durbin*, under their quit-claim, might have occupied his position. The evidence, however, fails to show that *Henry Fitzhugh, jun.* was a purchaser for value; and when his purchase is taken in connection with the subsequent assignment to *Barney, Hubbard and Durbin*, it tends very strongly to suggest that the deed from *Fitzhugh & Littlejohn* to young *Fitzhugh* was a voluntary conveyance; and I think when he afterwards quit-claimed to *Barney, Hubbard and Durbin*, to carry out the purpose of that assignment, he must be regard-

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ed as holding the title simply in trust for Fitzhugh & Littlejohn up to that time.

The real transaction, then, was an assignment by Fitzhugh & Littlejohn of the lands in question, with other property, to Barney, Hubbard and Durbin, for the payment to them of \$25,000. And the question remains whether they, as assignees, can defend the mortgages on the ground of usury. As they took that assignment "subject to any indebtedness of the said Fitzhugh & Littlejohn to the said City Bank," I do not think they are in a position to set up usury in this case. (*Sands v. Church*, 2 *Selden*, 355, 6, and cases there cited.) In my opinion they must be regarded as assignees of Fitzhugh & Littlejohn, and not as purchasers from Henry Fitzhugh, jun. It would hardly be contended that they could claim the benefit of the covenants in the deed from Fitzhugh & Littlejohn to Henry Fitzhugh, jun. So far as the evidence speaks, it tends strongly to show that the conveyance from Henry Fitzhugh, jun. to Barney, Hubbard and Durbin, was a part of the assignment, and that Fitzhugh & Littlejohn, up to that time, retained the whole beneficial interest in the land covered by the two mortgages in question.

There is another question made on the argument and suggested in the defendants' exceptions; and that is, that the balance unpaid is not covered by the mortgages. It is said that the terms of the mortgage are too indefinite. But it was held in the *Bank of Utica v. Finch*, (3 *Barb. Ch.* 294,) that a mortgage might be taken for future advances for a specific sum of money sufficiently large to cover the amount of the floating debt intended to be secured thereby; and that such future advances will be covered by the lien, to the extent of the sum mentioned in the mortgage, in preference to any claim under a junior incumbrance with notice. (*Id.* 297, 303. *Robinson v. Williams*, 22 *N. Y. Rep.* 380.) If the condition of the mortgage had been to secure future advances to a certain amount, and that amount had been advanced, it seems that it would not be competent to show by parol that it was

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intended also to secure a further indebtedness, so as to give it a preference over junior incumbrances. (*Truscott v. King*, 2 *Selden*, 147, 161.)

The condition of the mortgage in question was to pay "any money or moneys that might thereafter be loaned or advanced by the said bank to the said Fitzhugh & Littlejohn on notes, drafts, checks or otherwise, when the same should become due and payable, not exceeding the sum of \$50,000," as well as prior loans and advances to that amount. I think this language is broad enough to cover any balance which did not exceed that sum, and that the parties intended to provide for a floating debt within that limit. Whether the condition of the mortgage could be extended to cover debts not within its very terms, by a contemporaneous or subsequent parol agreement, does not arise in this case; and may perhaps be regarded as settled in the negative, in *Truscott v. King*, above cited. The demands established in this action arose before the defendants Barney, Hubbard and Durbin took a conveyance of the premises; and I think they took the conveyance and assignment subject to the mortgages, and to the payment of the balance reported due thereon by the referee.

The judgment should be affirmed.

[ONONDAGA GENERAL TERM, July 2, 1861. *Bacon, Allen, Mullin and Morgan*, Justices.]

CANDEE and DENNISON *vs.* HAYWOOD.

When unappropriated lands are resold by the state engineer and surveyor for the non-payment of the purchase price under § 4 of 1 *R. S.* p. 205, and the same are purchased in for the state under § 47, the former owner, if he intends to redeem, must avail himself of the privilege secured to him by § 48; and repurchase the same within three months thereafter.

He cannot redeem under § 3 of the act of 1836, (*Sess. Laws of 1836, p. 699*), for the reason that the redemption provided for in that section applies only to the case of the resale therein mentioned; when the premises, instead of being purchased in for the state, are actually struck off to a third person.

The vendee in possession under the first certificate of sale may be *ejected* at the suit of the subsequent purchaser, without being first served with a notice to quit.

Nor does he hold adversely, as against the state, so as to avoid the patent granted to the subsequent purchaser. The statute (3 *R. S.* p. 30, § 167) does not apply to lands owned by the state.

THIS cause was tried before Justice ALLEN, as referee, upon an agreed statement of the facts, who reported in favor of the plaintiffs. Judgment having been entered up, on the report of the referee, the defendant appealed to this court. The facts, so far as they are necessary to an understanding of the questions decided, are stated in the opinion of the court.

William H. Gifford, for the appellants.

H. Horton, for the respondent.

By the Court, MORGAN, J. This is an appeal from a judgment in favor of the plaintiff in an action of ejectment brought to recover possession of lot 8, block 192 B, of lands lying in the city of Syracuse. The defendant was in possession as the tenant of Catherine Taylor, and she was the assignee of a certificate of sale from the state engineer and surveyor to Dudley P. Phelps and George Barnes, dated April 10, 1852. There remaining due upon this certificate \$168.75, with interest for more than two years, the commissioners of the land office, on the 2d day of June, 1860, directed the state engi-

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neer and surveyor to resell the lands in question, under the provisions of the revised statutes. (1 R. S. 205, § 46.) It is provided in § 46 that in case of such sale all previous payments made on account of such land shall be forfeited to the people of this state. And by § 3, of the laws of 1836, page 699, the state engineer and surveyor is required to execute a certificate of such resale to the purchaser, specifying the terms of sale, the amount paid by the purchaser, and that the lands are subject to redemption pursuant to the provisions of the said act of 1836; and in case the premises shall be redeemed, as thereafter provided, the sale shall be void and of no effect. Section 3 of the act of 1836 then provides that the original purchaser "may redeem the same within three months after such sale."

It is also provided by 1 R. S. 205, § 47, that whenever the state engineer and surveyor shall sell any lot of land for the purchase moneys due thereon, and the sum due for principal and interest shall not be bid therefor, they shall purchase the same for the state at the amount so due, with the costs of sale. And by § 48 they may sell such lot, so purchased by them, for the state, "to any person who may apply to purchase the same, always giving a preference to the last owner, *provided he shall apply to purchase the same within three months after the sale*, for the amount at which the same was purchased for the state."

The lands in question were bid in by the state engineer and surveyor, for the state, no one having bid the sum due for principal and interest on the original certificate of sale. This was September 6, 1859. On the 1st day of February, 1860, the state engineer and surveyor sold the lands in question to Henry D. Dennison, one of the plaintiffs, for the sum of \$215.35, that being the amount of the balance remaining unpaid after the original certificate. This was a cash sale, and a patent immediately issued to Dennison. He afterwards conveyed an undivided half to his co-plaintiff, *Obadiah W. Candee*.

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The original owner, on the 4th of April, 1860, *within three months from the sale to Dennison, but more than six months after the premises were bid in for the state*, attempted to redeem by purchasing back the premises under § 48 above quoted. This was refused on the part of the state; and thereupon a tender was made to the state of the amount paid by Dennison, with ten per cent interest thereon, and which tender has ever since been kept good. It is not stated in the evidence that any offer was made to redeem under §§ 3 and 4 of the act of 1836 above mentioned; but as no question is made by the plaintiff in respect to the form of the offer to redeem, it may be assumed that the original owners did all that was necessary to redeem, except that their application to redeem was not in time. Assuming the resale to have been regular, I think the original owners did not comply with the statute, so as to entitle them to a redemption.

The original owner could not redeem under the act of 1836, for there was no resale as contemplated by that act. The resale therein mentioned is where the premises are actually struck off to a third person; in which case a certificate is granted containing the terms of sale; to become void if the original purchaser, his heirs or assigns, redeem the same within three months after such resale.

Prior to this act, if the premises were resold to a third person and not bid in for the benefit of the state, there was no redemption allowed to the original purchaser of the land. When the premises are bid in for the state, there is no benefit to be derived from the act of 1836. The original purchaser was already provided for by § 48 of the revised statutes, and that is all the benefit secured to him in this case.

The original owner had a preference, *provided he applied to purchase* the premises within three months after the sale. This sale obviously means when the premises have been purchased in for the state. (1 R. S. 205, §§ 47, 8.) As these three months had expired before application was made to redeem,

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I think the defense is not sustained upon the idea of a redemption; unless there has been such an irregularity in the proceedings of the state officers as to injure and mislead the parties interested in the redemption. It is claimed by the counsel of the defendant that the defendant was entitled to notice to quit. If the case was between individuals, no notice would be necessary; but on default of payment of any installment by the vendee in possession, the vendor could maintain ejectment, without notice, to recover back the premises. (21 *Wend.* 230. 7 *Barb.* 74. 20 *id.* 509.)

The statute has not provided for giving notice to the vendee in this case; and it is enough to authorize a resale, that the vendee is in default for one year on his payment. He knows, or should know without actual notice, that the commissioners of the land office may proceed immediately afterwards to forfeit his rights under the certificate of sale. By 1 *R. S.* 206, § 53, the commissioners are required to give the occupant notice to remove from the premises; and in case of his refusal, the district attorney may be required to proceed by complaint before the county judge and obtain an order to remove him. (§ 53.) Although this notice may be of service to the occupant, to remind him that he is in default, it was not intended for his benefit; nor can he complain that he has not been proceeded against under these provisions, instead of being prosecuted in the action of ejectment.

Doubtless the state officers must proceed to a regular sale of the premises, before the original owner can be turned out of possession by ejectment, when he offers to redeem. The proceedings here seem to have been regular in all essential particulars, so far as the original owners have any interest in the questions raised, and I think the defendant comes too late with his offer to repurchase or to redeem the premises.

The objection that the defendant was in the adverse possession, and therefore the patent to Dennison was void by the statute, (3 *R. S.* 30, § 167,) does not seem to be well found-

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ed. That statute does not apply to lands owned by the state.
(4 *Kent's Com.* 485. *Jackson v. Gumaer*, 2 *Cowen*, 552.)

Judgment affirmed.

[ONONDAGA GENERAL TERM, October 1, 1861. *Bacon, Allen, Mullin and Morgan*, Justices.]

PORTER *vs.* THE NEW YORK CENTRAL RAIL ROAD
COMPANY.

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A passenger on the N. Y. Central Rail Road, who applies at the ticket office just in time to procure his ticket, and get on board of the train in safety before its actual departure, and who fails to procure a ticket in consequence of the temporary absence of the ticket agent, cannot be charged an extra rate of fare.

The duty is upon the rail road company to keep the office open until the departure of the train; and the good faith of the conductor in demanding the extra fare, will not relieve the company from the penalty of extortion.

The conductor must be regarded as the agent of the company, in demanding fare of the passengers, and as acting within the scope of his general authority.

It seems the company will be liable in such a case, although the conductor acted contrary to orders.

ACTION to recover the penalty of \$50, under the provisions of an act of the legislature of this state, entitled "An act to prevent extortion by rail road companies." (*Laws of 1857*, p. 432.)

The cause was tried before Justice MORGAN and a jury, at the Onondaga circuit, in February, 1861. The defendant's counsel requested the court to charge the jury: (1st.) That the company was not responsible for the penalty, for the act of the conductor in taking excessive fare, without affirmative proof that they authorized it. Refusal and exception. (2d.) That the defendant was only required, by statute, to keep the ticket office open for one hour previous to the time

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fixed for the cars to leave by the time table. (3d.) That if the agent had occasion to step out a minute or two, a reasonable time, after an application for a ticket, should be allowed, to call him.

The court charged that if, when the plaintiff applied for a ticket, the ticket drawer was locked and the key in Curtis' pocket, the plaintiff was not bound to wait until Curtis could be called, or the key obtained ; that in such a case the office was not open, within the meaning of the statute ; *and that if there was time enough after the plaintiff applied for his ticket to make the change and give him his ticket, and enable him to get on the cars with safety before the train started*, had the drawer been unlocked, then the plaintiff was entitled to recover. To which charge, and refusal to charge, the defendants' counsel excepted.

The jury having returned a verdict for \$50, judgment was perfected thereon ; and the defendant appealed to this court.

The character of the evidence is sufficiently given in the opinion of the court.

D. Pratt, for the appellant.

Wm. J. Wallace, for the respondent.

By the Court, MORGAN, J. This is an appeal from the judgment of the circuit court, rendered upon the verdict of a jury, against the rail road company, for the penalty of \$50, for a violation of an act of the legislature of this state, entitled "An act to prevent extortion by rail road companies," passed March 27, 1857. (*Laws of 1857, p. 432.*) The act provides that "any rail road company which shall ask and receive a greater rate of fare than that allowed by law, shall forfeit fifty dollars ; which sum may be recovered, together with the excess so received, by the party paying the same."

The case shows that the plaintiff rode on the defendant's

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cars from Chittenango to Syracuse, and that the conductor required him to pay five cents more than the usual fare ; upon the assumption that the plaintiff had entered the cars without a ticket ; which he should have obtained at the ticket office in Chittenango before getting aboard. This additional sum of five cents may be charged upon the passenger who enters the cars without first having purchased a ticket for that purpose, "at any station where a ticket office is established and open ;" and the New York Central Rail Road Company "shall keep the same open for the sale of tickets *at least one hour prior to the departure of each passenger train from such station.*" (*Laws of 1857, p. 488.*)

The plaintiff applied at the office of the company at Chittenango for a ticket, and failed to obtain it. This was just prior to the departure of the train ; and it was left to the jury to determine whether there was time enough after the plaintiff applied for his ticket, to procure it and get aboard the cars with safety, before the actual departure of the train. It must therefore be assumed that if the ticket office had been open, the plaintiff could have procured his ticket in time to enter the cars with safety, before their actual departure. It also appeared, in the case, that the office had been kept open until within a few minutes before the plaintiff applied for a ticket, and that the train was behind time ; so that in fact the jury would have been authorized to find that the office was kept open until the advertised time for the departure of the train had expired. It also appeared that the plaintiff was in the neighborhood of the ticket office, and had ample time to go for his ticket ; but that he waited until he heard the whistle of the engine of the approaching train, and then went to the office for his ticket. The ticket agent was absent, but came in on the train, but without the key to the drawer ; so that he was unable to supply the plaintiff with a ticket. Mr. Curtis, who was in charge of the ticket office in the absence of the ticket agent, had stepped out to the train on its approach, and had taken the key with him.

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I see by the charge, which it is said I gave to the jury, that I told them that if the ticket office was locked when the plaintiff applied for his ticket, he was not bound to wait until Curtis could be called or the key obtained ; that in such case the office was not open, within the meaning of the statute. There is evidently some mistake here ; and the charge, if made, was not applicable to any state of facts which the evidence authorized ; for both the plaintiff and the ticket agent agree, that there was not time to call in Curtis and procure the ticket before the departure of the train. There might have been a state of facts shown, which would have required the plaintiff to wait until Curtis could be called into the ticket office ; and I very much question whether the instructions given can be sustained, if the facts had shown that the plaintiff had time to get his ticket, even if he had to wait for Curtis to be called in. The exception is to the whole charge, and I do not think it should prevail, unless we can see that the jury were liable to be misled by that part of it which is objectionable. As no evidence was given authorizing the jury to find that there was time for the plaintiff to procure a ticket by calling in Mr. Curtis, the instructions were harmless, and furnish no reason for granting a new trial. The remainder of the charge lays down the proposition that the company would be in default if the passenger applied for his ticket in time to procure it and take the train before its *actual* departure. If the company have nobody there to furnish it, the office is not open, within the meaning of the statute, although the ticket agent had been in attendance only a few minutes before and had temporarily left the office. I do not speak of a case where the passenger knows or has reason to expect the ticket agent back in time to furnish the ticket ; but of the case in hand, where it is conceded that the ticket agent did not intend to make an effort to open the office, and the plaintiff had no ground to expect that a ticket could have been procured in time for him to take the train. The jury have found that if the office had been open when the plain-

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tiff applied for his ticket, he could have procured it in time to enter the cars with safety. It is however claimed that the statute only requires the ticket office to be kept open for one hour preceding the time advertised for the starting of the train; and the learned counsel for the defendant desired me so to instruct the jury. This instruction was refused, and the defendant's counsel excepted. But by referring to the statute it will be seen the language speaks of *the departure of the train*, not of the *time* when its departure is advertised to take place. And this is the obvious intention of the legislature.

Although the New York Central Rail Road Company run their trains by time tables with commendable punctuality, it is not an uncommon occurrence for a train to be some minutes behind time. Sometimes they meet with accidents or obstructions, and do not make regular time by an hour or more. It is not an unusual thing, in such a case, for new passengers to arrive by other roads, who are in time to take the train; who would procure their tickets if the office is kept open till the actual departure of the cars. Shall they be subjected to five cents extra charge because the ticket office has been closed by the regular time advertised for the departure of the train, instead of the time of its *actual* departure? In my opinion, the rail road company is required to keep its ticket office open until the *actual* departure of the train; and if they close it prior to that time, passengers who afterwards apply for tickets in time to enter the cars with safety, cannot be charged the additional fare.

A point is made that the act of the conductor, in exacting this additional charge, was not the act of the rail road company. But I think it is too plain for argument, that the conductor, in exacting fare of passengers, must be regarded as the agent of the company, and acting within the scope of his general authority. And that the company would be liable in such a case, although the conductor acted contrary to

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orders. (*Philadelphia and Reading Rail Road Company v. Derby*, 14 How. U. S. Rep. 468.)

It is no excuse to the conductor that he was mistaken, and demanded the extra fare under the belief that the ticket office at Chittenango was open, and that the plaintiff had omitted to apply for his ticket. The duty is upon the rail road company to keep the ticket office open until the departure of the train; and the good faith of the conductor, in demanding the extra fare, will not relieve the company from the penalty. This would, in effect, allow the company to take advantage of their own neglect, to relieve themselves from its consequences.

If my brethren concur with me in the opinion that there was no evidence given or claim made, that the plaintiff could have waited for Curtis to be called in, in time to get a ticket; and that there was no such opportunity offered to him on the occasion; then I think the exceptions should be overruled, and a new trial denied.

Judgment affirmed.

[ONONDAGA GENERAL TERM, October 1, 1861. *Allen, Mullin and Morgan*, Justices.]

MUNRO vs. POTTER, impleaded with Thorn.

When one who is principal in a joint and several note, makes a payment of interest at the request of the other joint maker, and it is indorsed on the note, such payment is evidence of a new promise, by both makers, sufficient to take the case out of the statute of limitations.

If, upon the undisputed facts of the case, the decision at the circuit is right, a new trial will not be granted, because the judge gave the wrong reason for it.

It seems, that when the surety in a joint and several note receives the money of the principal and sends it to the holder of the note, with directions to have it properly indorsed, and it is indorsed accordingly, he cannot relieve himself from the consequences of the indorsement, by assuming to act as an agent merely. *Per MORGAN, J.*

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Munro v. Potter.

THIS action was upon a promissory note of the defendants for \$2000, dated October 20, 1853, payable to the plaintiff or bearer, on demand. It was for money borrowed by Thorn. Potter appeared and set up the statute of limitations. There appeared, among others, the following indorsements :

“\$140. Received the interest on this note up to October 20, 1857.

\$200. Received on the within note \$200. October 8, 1858.

Rec'd May 3, 1859, of the assignees of O. Thorn, the second dividend on within, it being \$202.91.”

In the fall of 1857, the three last years' interest upon the note remaining unpaid, the plaintiff called upon Potter for it, and he said he would see Thorn, and the interest should be paid. Potter accordingly applied to Thorn to pay the interest, and Thorn thereupon paid it, and it was indorsed upon the note.

Thorn, prior to October, 1858, made a general assignment of his property to one Talcott, for the benefit of his creditors. A dividend was made, and Talcott had in his hands \$202.92, to be paid upon this note. Thorn requested Potter to take it to the plaintiff. Potter, after some hesitation, consented, took it and sent \$200 of it by one Kidder to the plaintiff, with directions to have it indorsed on the note, and it was indorsed accordingly.

When the evidence was closed, the defendants' counsel desired the court to submit the question of fact to the jury, whether Potter paid the money on the note on his own account, or as the agent of Thorn's assignee; and whether Munro received it from him as such agent. The court declined, and held that upon the facts of this case, there was no question for the jury; “and that the payment and indorsement upon the note, under the circumstances, was sufficient to take the case out of the statute of limitations.”

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The jury found a verdict for the amount due on the note, upon which judgment was entered. The defendant Potter having excepted to the decision, appealed to this court.

D. Pratt, for the appellant.

Charles Andrews, for the respondent.

MORGAN, J. I told the jury in this case, that there was no question of fact for them to decide; but that the payments and indorsements on the note, under the circumstances, were sufficient to take the case out of the statute of limitations, as to Potter.

The counsel for the appellant desired me to submit to the jury the question, whether the last payment of interest was by Potter, on his own account, or as the agent of Thorn.

This I declined. The case as settled leaves it in some doubt whether I did not direct a verdict upon the sole ground of the last payment, and not generally upon the facts of the case as to the payments in question.

It must be admitted that the payment of interest in the fall of 1857, was made at the request of Potter; and that within the principles of the case of *Winchell v. Hicks*, (18 N. Y. Rep. 558,) this circumstance was sufficient to keep the note alive as to him, without regard to the payment of 1858.

It does not appear from the statement of the case what disposition was made of the evidence in regard to this payment of 1857. Some question was started in regard to the last payment, and that appears in the exceptions. There was no dispute as to the fact that Potter requested Thorn to pay the interest, in 1857. If the decision had been put distinctly upon the payment of 1857, there would be no doubt of its correctness.

It is the business of the party who takes exceptions to show that the decision is wrong. It is not enough that he succeeds in mystifying it, by adopting language which subjects the

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judge to the suspicion that he did not understand the safest ground on which to place it. It is enough that the decision is right upon the undisputed facts of the case, whether the reason given is true or false. A new trial in such a case would do no good ; but on the contrary, would subject the parties to an expensive litigation, to correct a theoretical error, which was not at all important to a correct decision of the questions involved. It would be sufficient, however, to induce this court to grant a new trial, if the case showed that the defendant had any way by which he could have avoided the result, if the true ground of the decision had been mentioned by the judge. But here the evidence was closed ; and it would be the merest speculation to suppose that the circumstances of the payment of interest in 1857, could have been altered at that stage of the trial. It is not even suggested on the argument that there was any way to overcome the effect of that payment.

If the court, however, should come to the conclusion that the decision is based solely upon the payment of interest on the note in 1858 ; and that the defendant's counsel might have overcome the effect of the evidence as to the prior payment ; then I think we are required to look into the facts, as to the payment of 1858, and Potter's admitted connection with it ; and if we can see that the jury could fairly give it such an interpretation as would relieve Potter from liability, that a new trial ought to be granted.

The instruction asked for was, that if Potter was the agent of Thorn's assignee in making this last payment, he did not thereby make himself responsible for its legal effect upon the party who furnished the funds. The proposition is, that one joint maker of a note may become the agent of the other in making a payment, without personal liability as to himself. If he does it as agent of the other joint maker, he does not, it is said, do it himself. It is admitted that he has an interest in the payment. If the note is not outlawed, the payment results to the benefit of both parties. At the time this

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last payment was made, Potter was still liable on the note ; and he had therefore an agency coupled with an interest. This interest was a stronger legal motive to his action than his responsibility as a mere agent. He participated in the act of payment, where he had an interest sufficiently strong to account for his conduct, without clothing him with a naked agency. Can he now say that he did not participate in the act of payment, except as a mere naked agent of the other joint maker ? Certainly he did nothing at the time to repudiate his connection with the matter, or avoid the effect of the payment in question.

He knew that the principal was about to make a payment on the note which would benefit him, and revive it as against both parties, if they both participated in it. Potter now says, "I did not participate in it because I had any interest in it, but as the mere agent or messenger of the other party. If the note does not outlaw as to me, before suit, I get the benefit of it : if it does, I repudiate the payment, and claim the benefit of the statute of limitations."

To my mind there is something inconsistent in the two characters. Men are supposed to consult their interests ; and when it is for the pecuniary interest of a man that a payment should be made by the principal debtor, and he consents to take the money and see to its application, the law will not allow him to assume that he did the act gratuitously, and not in obedience to his pecuniary interest. He cannot, in my opinion, afterwards call it a mere gratuitous act, without expectation of benefit to himself, because it happens in the course of time that it will turn out to his advantage to give it that construction. The law implies a new promise to pay a debt, barred by the statute of limitations, from a mere acknowledgment of a subsisting obligation. That acknowledgment is sufficiently evidenced by the payment, and indorsement of the payment on the obligation. If a surety requests the principal to make a payment of the interest on the obligation, and it is accordingly made and indorsed, the

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act is regarded as the acknowledgment of both parties. (*Winchell v. Hicks*, 18 N. Y. Rep. 558.)

Formerly, the law imputed the act of payment by one joint obligor as the act of both parties, on the ground of a supposed agency between them. It is now held that no such agency exists, (*see cases cited by Judge Allen in Winchell v. Hicks, above*;) and it simply follows that one joint maker cannot bind the other by such an acknowledgment, without his consent. But it has not been held that the other joint maker is not bound, when he knows of and assents to the payment. If he requests it, he is bound, as was decided in the case above cited. And I think it follows that he is equally bound if he knows of it at the time, and does any act whatever to facilitate it.

In this case, the act was done for the benefit of Potter, as well as the principal; for the note was not then barred by the statute. Potter knew of it, took the money to the holder of the note, and had it properly indorsed as so much paid by the principal; whose duty it was to make the payment. Grant that he was an agent; that does not relieve him from the knowledge and approval of an act done by the principal for his benefit. He was an agent, and more too. He had an interest and was competent, although acting as an agent, to approve and ratify the act in question, as having been done for his benefit, as well as that of the principal.

In my opinion, therefore, he was bound by the acknowledgment which the act indicated; and which he participated in, and approved of, at the time it was done. As the act was done for his benefit, it will be assumed that he approved of it.

For these reasons, I think a new trial should be denied, even if the court come to the conclusion that the decision must rest upon the effect of the evidence of the payment of 1858.

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BACON, ALLEN and MULLIN, justices, concurred upon the first ground taken ; but without expressing any opinion upon the last proposition.

New trial denied.

[ONONDAGA GENERAL TERM, October 1, 1861. *Bacon, Allen, Mullin and Morgan, Justices.*]

FORD vs. JOHNSON and BARRETT.

A *threshing machine* is not exempt from levy and sale on execution, under the act of April 11, 1842, to extend the exemption of household furniture and working tools from distress for rent, and sale under execution.

EXCEPTIONS ordered to be heard at general term, in the first instance.

McKay & Farnam, for the plaintiff.

Comstock & Healy, for the defendants.

By the Court, DAVIS, J. The only question in this case, is whether a threshing machine is exempt from levy and sale on execution, under chap. 157 of the laws of 1842, as amended by chap. 134 of the laws of 1859.(a) That statute exempts from such sale "necessary household furniture and working tools and team owned by any person being a householder, or having a family for which he provides, to the value of not exceeding two hundred and fifty dollars."

The plaintiff's threshing machine was seized, with certain other property, by the defendants, on execution, and this action was brought to recover the value of the property taken. The court charged that the threshing machine was not ex-

(a) *Laws of 1842, p. 193; Laws of 1859, p. 343.*

empt; to which charge the plaintiff duly excepted. The plaintiff had a verdict for the value of certain other articles of property; but under the charge, the jury excluded the value of the machine.

It was proved on the trial "that said threshing machine was five rods long from one end to the other, and was propelled by horse power, and it required eight or ten horses, and the power of that number to use or operate the said machine; and that it required ten men to attend the said machine, and to conduct and manage the same when in operation."

It is insisted by the plaintiff that this threshing machine is a "working tool," within the definition of that term as used by the act of 1842. That act has received a liberal construction from the courts. The word team has been held to embrace a buggy wagon or gig used by a physician in his practice; a horse and cart used by a carman in his business; a single harness necessary in the business of the owner; and the single horse of a physician. (*Wheeler v. Cropsey*, 5 How. 288. *Lockwood v. Younglove*, 27 Barb. 505. *Eastman v. Caswell*, 8 How. 75. *Harthouse v. Rikers*, 1 Duer, 606. *Hutchinson v. Chamberlin*, 11 Leg. Obs. 250.) And it is undoubtedly the duty of the court, since these acts "concern the public good," to give them an enlarged and liberal construction. (*Carpenter v. Herrington*, 25 Wend. 370.)

I have examined the question involved in this case in the spirit of the rule laid down by the courts in the several cases cited, but have been unable to bring my mind to the conviction that the complicated machine, described in the case, is within the most liberal definition of the words "*working tools*;" or that the legislature intended those words should have a signification broad enough to cover it. The common understanding of those words would never embrace such a machine. If the plaintiff were to sell to another all his working tools, by that description, it would not be thought by him or the purchaser that it included his threshing machine.

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The word "tool" is never applied to such a machine. No lexicographer can be found who gives such a signification to the word, or defines it in any way that would justify its use in that sense. The courts, so far as I am able to find, have not enlarged the sense of those terms sufficiently to include the machine in question.

In *Buckingham v. Billings*, (13 *Mass. R.* 82,) it was held that a printing press was not a *tool*, and therefore not exempt under the statute of that state, which provided "that the tools of any debtor, necessary for his trade or occupation, shall be altogether exempted from attachment and execution."

In *Danforth v. Woodward*, (10 *Pick.* 423,) it was held that printing types and forms were not tools, and were not exempt from attachment; and Wilde, J. said: "The word tool is not understood, either in its strict meaning or popular use, as designating complicated machinery, which, in order to produce any useful effect, must be worked by combining distinct parts, or separate pieces, the aid of more hands than one being necessary to perform the operation."

In *Kilburn v. Deming*, (2 *Verm. R.* 404,) it was held that a portable machine called a "Billy and Jenny," used for spinning and manufacturing cloth, was not a *tool*, and not exempt.

In *Bachelor v. Shapleigh*, (1 *Fairf.* 135,) a mill saw was held not to be a tool. "It is not," said the court, "an instrument worked by hand, or by muscular power, but part of a mill propelled by water."

In the case at bar, the machine required "a horse power," and the use of eight or ten horses and ten men, for its propulsion. Without all these it could be applied to no practical use, and would be valueless as a means to provide for the support of the plaintiff's family.

It may be very proper for the legislature to extend the exemption laws so far as to exempt machinery used, as this was, in the ordinary avocations of life; but that question is for them to determine. Under the present laws of the state, I

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feel bound to hold that the statute is not broad enough to exempt the property in question.

The motion for a new trial should be denied, with costs, and judgment ordered on the present verdict, for the plaintiff.

[ERIE GENERAL TERM, February 11, 1861. *Marvin, Davis and Grover*, Justices.]

 BIRDSEYE vs FROST.

To prevent a recovery for a breach of warranty upon the sale of property, on the ground that the defects existed, and were visible, at the time of the sale, it must be shown that the defects were such as could be discerned by an ordinary observer examining the property with the view of trading for it, and were such as not to require skill to detect them.

Where, on the trial of such an action in a justice's court, the question whether the defects complained of were visible at the time of the trade, so as to take them out of the operation of the warranty, is before the justice, and is passed upon by him, his finding is conclusive.

The question whether the defects were visible, and therefore not reached by the warranty, is not one of law merely, but is, *it seems*, a mixed question of law and fact; and is therefore, so far as the fact is involved, within the rule that forbids the reversal of the judgment of a justice, rendered on conflicting evidence.

THIS action was for a breach of warranty upon the sale of a span of horses. It was brought before L. Wells, a justice of the peace of Onondaga county. The complaint alleged that the defendant warranted that the horses were *sound and right every way*, except that one had a blemish on his nose and the other was a stallion; but that they were not sound, and were ringboned and had the heaves. The answer denied each allegation in the complaint. The cause was tried on the 14th of July, 1858, before the justice, without a jury, and on the 17th of July he rendered a judgment in favor of the appellant for \$70 damages, and \$2.54 costs. From this

34	367
44	539
4h	231

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judgment the defendant appealed to the county court of Onondaga county, and that court reversed the same, with costs. The decision of the county court was put upon the ground that the evidence showed that the defect, of the ring-bone, was visible to the eye, and therefore a general warranty would not apply to the defect.

From the decision of the county court the plaintiff appealed to this court.

L. Birdseye, for the appellant. I. There was an *express warranty* entered into by the defendant. The justice has so found upon testimony which was conflicting. His finding cannot be disturbed upon appeal. (*Pozzoni v. Henderson*, 2 *E. D. Smith*, 146. *Biglow v. Sanders*, 22 *Barb.* 147. *Wiley v. Slater*, *Id.* 506. *Cook v. Moseley*, 13 *Wend.* 277. *And the authorities cited in these several cases.*)

II. The justice also found that the warranty of *soundness* was *broken*, and that the plaintiff was entitled to recover the damages he sustained thereby. The finding and decision upon this point is abundantly sustained by the evidence, and cannot be reviewed upon appeal. (*See same cases.*)

III. There was evidence sufficient to warrant the justice in finding that one of the horses had the *heaves* at the time of the sale. The plaintiff discovered them in less than a week after the sale. Another witness (Coulter) thought he discovered them *on the day of the sale*. The disease certainly exhibited itself so soon after the sale, and in so marked a manner, as to warrant the justice in finding, as a fact, that it actually existed *at the time the bargain was made*. And this court must intend that the justice so found.

IV. It cannot be claimed that this disease was so plainly visible and patent as not to be covered by the warranty. It will not be pretended that any decided case, or other legal authority exists, showing *the heaves* in a horse to be in all cases a visible and patent defect. Proof was required to show that they were so in this case. No such proof exists here.

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The defendant swears, "I did not know that either of the horses had the heaves before the sale; had seen no indication of it." The plaintiff did not discover them till four or five days after the sale. And the strongest proof on this point is that the disease could be detected at the time of the sale, in riding after the diseased horse, or by hearing him breathe, (that is, doubtless, by one skilled in horses, or familiar with their diseases, by listening closely or attentively to his breathing, after he had been driven.) It therefore does not appear that the disease was sufficiently marked, or had progressed far enough to be visible to the eye, or discernible by the ear, *until the horse had been driven*. Hence it was a *latent defect*, which the purchaser could not discover upon a bare inspection; and it would be covered by the warranty of soundness. For aught that appears upon the justice's return, his judgment may have been based on an actual finding, as a matter of fact, that one of the horses had the "*heaves*" *at the time of the sale*, and that the warranty was thereby broken, and that the damages awarded by the judgment were the result of that breach. As the proof abundantly justifies such finding, the judgment was erroneously reversed.

V. The county judge reversed the judgment solely because, *in his judgment*, the whole evidence showed that the defect of the *ringbones* alone was visible to the eye, and therefore a general warranty would not apply to such a defect. The reversal was erroneous. For it was the province of the *justice* in the court below to decide whether the defect was or was not plainly visible. The judgment as rendered includes a finding that it was not so. There was evidence on both sides of this question. The plaintiff says he did not discover the defects till they were pointed out to him. According to the authorities cited under point I. this finding could not be disturbed on appeal. The case then becomes precisely like that of *Butterfield v. Burroughs*, (1 Salk. 211. And see this case as cited in *Comyn's Dig.* 238, tit. *Action upon the Case for a Deceit*, A 11; also in 3 *Black. Com.* 165, book 3,

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chap. 9, sub. fin.; and in 2 Phil. Ev. 104; and in Chit. on Cont. 456, 6th Am. ed.) In that case the warranty was that the horse was *sound*; whereas he had but one eye. Verdict for plaintiff. In arrest of judgment, it was objected that the want of an eye is a visible thing, whereas the warranty extends only to secret infirmities. It was held that the warranty was broken, if the malady *by possibility was not visible*. For perhaps it was not discerned, and it shall be intended that it was not, after a verdict for the plaintiff. And see *Margetson v Wright*, (8 Bing. 454; 1 Moore & S. 622, S. C.;) also *S. C. at first trial*, (7 Bing. 603; 5 M. & P. 606, S. C.;) also *Liddard v. Kain*, (2 Bing. 183; 9 Moore, 356, S. C.;) *Shepherd v. Kain*, (5 B. & Ald. 240.)

VI. In other words, wherever the defects, though they seem to be plainly visible to the purchaser, are yet such that their discernment is a *matter of skill*, there the purchaser has a right to rely upon the warranty, and the action will lie. (See 2 Steph. N. P. 1290, *tit. Deceit*; 1 Vin. Abr. 580, *tits. Actions, Case, Deceit*, pl. 14; *Chit. on Cont. 456, 6th Am. ed.*; 2 *Phil. Ev. 104, note b*; *Pars. Mer. Law*, 57; 1 *Par. on Cont. 459, note i*; 1 *Com. Dig. 238, tit. Action on Case for Deceit*, A 11, pl. 18, and E 4, and note a; *Cowen's Tr. 4th ed. § 253.*) In this case it is obvious that skill and familiarity with the treatment and use of horses was required, to enable the purchaser to detect the presence of ringbones. It is not every swelling on the limbs of a horse that is evidence of ringbones. Doolett says: "A detector of ringbones might see them across this room." "They were not large." And Coulter did not discover any ringbone when he went with plaintiff to Frost's house, a few days before the sale. The other disease, the *heaves*, was certainly to be discovered only by skill, and by a careful watching for its symptoms after the horse had been driven.

VII. The error of reversing the judgment of the justice on the ground taken by the county judge, becomes palpable when the precise terms of the rule of law in regard to except-

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ing visible defects from a general warranty are adverted to. All the authorities make the *senses of the purchaser* the test whether the defect be or be not plainly visible. And many make the fact whether he did or did not actually know of the defect at the time of the sale, the criterion. In every case put, the defect instanced is not merely visible, but palpable; one that *cannot escape notice*. Thus in 2 *Chitty's Pl.* 280, note g, tit. *Declarations on Warranties*, 7th Amer. ed., the rule is thus stated: "A general warranty will not extend to guard against defects that are *plain and obvious to the senses of the purchaser*; as if a horse be warranted *perfect*, and wants a tail or an ear." "A general warranty does not extend to defects *which are known to the purchaser*, or which are open to inspection and observation, *unless the purchaser is at the time unable to discover them readily, and relies rather upon the knowledge and warranty of the seller*." (*Parson's Merc. Law*, 57. And see *Dyer v. Hargrave*, 10 *Vesey, jun.* 506, 7; *Schuyler v. Russ*, 2 *Caines*, 202; 7 *Dane's Abr.* 562, ch. 225, art. 11, § 1; 2 *Kent's Com.* 484, 8th ed.; and see the other authorities cited under 8th point.)

VIII. But the decision of the county judge is directly opposed to a uniform current of authorities. It has been held from the earliest times to the present, that if the purchaser was blind, he was at liberty to avail himself of the general warranty, however palpable the defect might be to others. Thus, in 3 *Black. Com.* 165, "A general warranty will not extend to guard against defects that are plainly and obviously the object of one's senses; as if a horse be warranted perfect, and wants either a tail or an ear; *unless the buyer in this case be blind*." To the same point is 1 *Selwyn's Nisi Prius*, by *Wheaton*, 536, note b, 4th Am. ed., p. 645, note b, in 7th Lon. ed.; also 2 *Starkie's Ev.* 905, tit. *Warranty, Breach*, 5th Phila. ed. 1834; and 15 *Peterdorf's Ab.* 374, tit. *Warranty*, note b.) So, in *Story on Sales*, § 354, "A general warranty is not understood to ex-

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tend to patent defects which are *apparent upon careless inspection*, or to defects which are *at the time known to the buyer*. If, however, the vendee did actually neglect to examine, and were unaware of the defect, *or were physically unable to perceive it from blindness*, the seller would be bound to the full extent of his warranty, although the defect were patent." To the same effect is *Story on Cont.* § 830, 2d ed. The authorities cited by Story for these positions fully sustain them. They are, *Butterfield v. Burroughs*, 1 Salk. 211, 3 Bl. Com. 165, *Viner's Abr. and Bro. Abr., Deceit*, pt. 2, citing 11 E. 4, 6. In the *Year Book*, part 9, Anno 11 Edward 4, fol. 6 b, case 10, title *Deceit*, (sub fin.) Brian, J. says, in perhaps the earliest case establishing the exception to a general warranty where the defect is patent, "If he that bought in that case had been blind, he would have had the action of deceit." To the same effect is *Brooke's Abr.* fol. 233, title *Deceit*, pt. 29, citing the *Year Book*, as above. Also 1 *Viner's Abr.* 580, tit. *Actions, Case, Deceit*, Z b, pl. 15, and A c, pl. 7. In the latter place, it is said, "if the vendee be blind, deceit lies," for a breach of an express warranty, by an obvious and patent defect. 2 *Dane's Abr.* 543, ch. 62, art. 1, § 15: "An express warranty does not extend to visible defects; as the want of an ear of a horse; *otherwise, if the buyer be blind.*" And see 7 *Dane's Abr.* 562, ch. 225, art. 11, § 1, where the right to sue for a breach of a general warranty by reason of visible defects, is said to depend upon whether "*the buyer, when he agrees, knows the defects.*" So, in 7 *Petersd. Abr.* 540, tit. *Deceit B*, note, "A warranty will not be binding where the *deception is apparent, or the falsehood of it known to the vendee*; as if a man warrant a horse with an obvious and visible defect to be sound, or cloth that is blue to be black, *if the vendee was capable of seeing.*" And 15 *id.* 374, tit. *Warranty 6*, note, has the same exception, of the blindness of the vendee.

IX. For the reasons stated in points VII. and VIII., the question objected to, as to the defect in the plaintiff's eye-

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sight, was properly allowed. The proof was material and competent, as giving him a right to recover, where possibly he might not otherwise have had it.

X. In answer to the Points for the defendant in the county court, it is submitted that the proof on the subject of damages was competent, and was properly allowed. (1.) The objection in each case was general, that the proof was incompetent and improper. Not to the form of the question or answer; but that *any proof* of damage was incompetent. (2.) For the reasons stated in the previous points, this objection was untenable, and was properly overruled. (3.) If any other objection to this proof existed, it was waived by the objection on untenable grounds, and by the failure to state the true grounds. (*Dunham v. Simmons*, 3 *Hill*, 609, and cases cited.) But (4.) All the questions on the subject of damages were correct in form and substance. They in substance asked for the difference between the value of the horses at the time of the sale, considering them as sound as regards the heaves and ringbones, and their value with the defects complained of, which is the true measure of damages. (*Cary v. Gruman*, 4 *Hill*, 625. *Whitney v. Allaire*, 1 *Coms.* 312.) (5.) If it be said that the questions relate to the time of the trial, and not of the sale, that objection should have been made distinctly at the trial. It could and would have been corrected at once, if made. To reverse for that ground would indeed be to "open the door for trickery, unbecoming and disgraceful in the administration of justice." (*Per Cowen*, J. 3 *Hill*, 611.) But the reference is fairly to the time of the sale. There was an interval of only five or six weeks between the sale and trial; and it cannot be claimed that any material change in the value of the horses had taken place during that time. Doubtless every person at the trial understood the proof to relate to the time of the sale, and not to that of the trial. (6.) Ellis' "competency to speak of damages," was expressly admitted by defendant. And the general objection of incompetency was immediately renewed. In

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the county court it was objected that he did not see the horses at or about the time of the sale. It does appear that he lived only a mile and a half from the defendant, and had known the team for a year, and one of them from a colt. And it does not appear but what he did see the horses on the day of the sale, or very near it. (7.) And so of Doolett. He knew of the ringbones, before the sale. And though he may not have seen the horses on the day of the sale, it was in fact admitted by defendant that he too was, from knowledge of the horses, competent to speak of damages. Otherwise a motion would have been made to strike out his testimony, after cross-examination. He had seen them two days before the sale.

Sedgwick, Andrews & Kennedy, for the respondent.

I. The proof leaves it extremely doubtful if there was any warranty; since both the defendant and Henry Frost testify that each took the property at his own risk; and the plaintiff is the only witness testifying to a warranty. But assuming that the judgment of the justice is conclusive on that point, then the warranty being general, did not cover visible defects. That the defects complained of, so far as the ringbone is concerned, are open and visible.

II. The question put to the plaintiff, "Have you a defect in your eyesight," was improper, and the objection to it was well taken. (1.) The object and effect of the evidence was to extend the legal effect of the contract made, and thereby change a general into a special warranty, against a visible defect. (2.) Its object and effect was to give the plaintiff the benefit of a contract he did not make. (3.) There is no evidence that the defendant had any knowledge of these defects in the plaintiff's eyesight, or that he had a right to suppose he was making an agreement with the plaintiff, to be construed differently from like contracts he might make with other men.

III. There is no evidence that the sorrel horse had the heaves at the time of the alleged warranty. The trade was

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made on Monday. The plaintiff thought he first discovered the heaves the Saturday after. This is the first time the heaves are discovered by any one. The defendant says, "I did not know that either of the horses had the heaves, upon the sale." Ezra Goodrich says, "I examined horses about the time of the trade, neither of them had the heaves." A warranty is confined to defects existing at the time of sale. The question then put to the witness Coulter, "How much less are these horses worth for having ringbones, and the sorrel one having the heaves," was improper, and the objection should have been sustained.

By the Court, MULLIN, J. The justice having found, upon conflicting evidence, that the defendant made the warranty charged in the complaint, and the amount of damages the plaintiff sustained by the breach of such warranty, these questions cannot be reviewed by us upon this appeal.

The only question before us is, whether upon the evidence there was a breach of the warranty, for which the plaintiff was entitled to recover; in other words, whether the warranty applied to the defects which it was proved the horses sold to the plaintiff had, at the time of such sale. It is not pretended by the defendant but that the horses had ringbones on their legs, but he insists that they were so plain to be seen that the plaintiff must have seen them, and hence that his warranty of soundness did not apply to them. If the defects were thus visible, the law is that a general warranty of soundness does not reach them. (*Chit. on Cont.* 456; *Pars. on Cont.* 459, note i.) The first question then is one of fact; were the ringbones visible to an ordinary observer?

The plaintiff says that after the trial, and after the defects were pointed out to him, he saw them. He discovered on the sorrel horse a bunch above the hoof, on each forward hoof, on the forward part of the ankle. The roan horse had a large bunch on his fore foot, in the same place. This discovery, he says, was made in about an hour after the trade.

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Coulter, who accompanied the plaintiff on the day the plaintiff first went to examine the horses, (which was the Wednesday preceding the Monday on which the trade was completed,) says he saw the horses on the same day of and after the trade; the roan one was lame in one of his legs; above the knee was a scratch, and on the foot a ringbone; on the sorrel horse were bunches on both feet, on the fetlock between the hoof and joint, which had the appearance of ringbones growing. He did not discover ringbones when he first went with the plaintiff. He took up one foot to see if he was flat footed. The horse when brought to witness' house, the day of the trade, limped so it could be seen 50 rods off. He could see those bunches, if looking for them, as far off as the end of the room. Ira Ellis says, one of the horses had ringbones from 6 months old. Henry S. Doolett says, the ringbones are not large; a detector of ringbones might see them across the room. On this evidence, it is quite clear that the ringbones were on the horse's legs, and were visible the day the plaintiff first saw them, as well as the day of the trial. But it is not enough that the defects exist and are visible. They must be such as could be discerned by an ordinary observer examining the animal with the view of trading for it, and such as not to require skill to detect them. (*Chit. on Cont.* 456. *Pars. Merc. Law*, 57. 10 *Vesey*, 507. *Margetson v. Wright*, 20 *Eng. C. L. Rep.* 269.) This precise question—whether the defects under consideration were visible at the time of the trade, within the meaning of the authorities cited, so as to take them out of the operation of the warranty—was before the justice, and passed upon by him, and it seems to me his finding must be conclusive. While there is not a conflict of evidence, arising from witnesses swearing to different and conflicting statements of facts or opinions, yet the facts sworn to by the different witnesses might well lead to different and conflicting conclusions. For example, the plaintiff swears that within an hour after the trade, on his attention being called to the defects, he discov-

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ered a ringbone on one of the horse's legs, which was a *large bunch*. Coulter, on the other hand, testifies that he was acquainted with ringbones, and examined the leg of one of the horses, and he did not discover the ringbone. The justice had before him all the facts before us; he had a much better opportunity to judge of the credibility and intelligence of the witnesses; and having rendered a judgment in favor of a party who has been wronged, either by the reliance which he placed on the defendant's representations, or by an omission to inspect with greater care the condition of the horses, we ought not to disturb it, unless imperiously required to do so by some stringent rule of law.

The county court, in rendering the judgment on the ground that the defects were visible, and therefore not reached by the warranty, treated the question as one of law merely. In this I think the county judge erred. It is probably a mixed question of law and fact; and is, therefore, so far as the fact is involved, within the rule that forbids the reversal of the judgment of a justice rendered on conflicting evidence.

For these reasons, I am of the opinion that the judgment of the county court should be reversed, and that of the justice affirmed.

Judgment reversed.

[ONONDAGA GENERAL TERM, July 8, 1860. *Allen, Mullin and Morgan*, Justices.]

CRIST *vs.* ARMOUR.

When either party to a contract which provides for performance by both parties at the same time and place, before the time for performance arrives, notifies the other that he will not perform, and does not, before the time for performance, recall such notice ; or if he puts it out of his power to perform on his part ; the other party is relieved from averring or proving performance, or offer to perform.

Thus where, after the making of a contract for the sale and delivery of a quantity of cheese, to be paid for on delivery, the vendor sold the cheese, and delivered a portion thereof to a third party, it was *held* that this put it out of his power to perform the original agreement ; and that the vendee could maintain an action for the breach thereof, without averring or proving performance, or a readiness or offer to perform.

Under such circumstances, the sale to the stranger will be assumed to have been a valid sale ; but even if it be shown to be otherwise, the vendor will not be entitled to allege it.

In an action by the vendee, for a breach of such a contract, the plaintiff's right of recovery is not to be limited to the damages sustained upon the portion of the property sold and delivered to the stranger.

THE complaint in this case alleged that the defendant, on or about the month of May, 1859, contracted and agreed to and with the plaintiff, to sell to the plaintiff and deliver to him, at the New York Central Rail Road depot, at Oneida, all the cheese he then had on hand, made from a dairy of forty cows, and also the cheese made from the said dairy thereafter, during the season of 1859 ; and in consideration thereof, the plaintiff was to pay the defendant therefor the sum of eight cents per pound for said cheese, payable on delivery, or whenever called for ; that it was also contracted and agreed, that the defendant should hold his cheese until called upon by the plaintiff for delivery, to the number of one hundred ; and the plaintiff averred that he had always faithfully observed and kept the said contract on his part, and that the defendant, on the 29th day of May, 1859, delivered to the plaintiff on the contract, at the said depot, thirteen hundred and five pounds of the said dairy of cheese ; and on the 22d day of June, 1859, twelve hundred and fifty-five pounds, at the place aforesaid ; and the plaintiff alleged that

34 378
50 84
56 69
8h 202
9h 337
56h 369
48a 278
61a 576
69a 294

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he paid the defendant for the cheese, so delivered upon the contract, the contract price, to wit, the sum of eight cents per pound, which was received by the defendant in full payment, upon the contract aforesaid, for that quantity. The plaintiff further alleged, that the defendant had, ever since the delivery of the said two parcels of cheese, wholly refused and omitted to perform the contract on his part; that the defendant made in his dairy, during the season of 1859, sixteen thousand pounds of cheese, which was sold to the plaintiff under the contract aforesaid, and all of which the defendant refused to deliver to the plaintiff at the said depot at Oneida, or at any other place, and which the defendant was bound to deliver as aforesaid, and which he has refused to deliver, although often requested so to do; and the plaintiff averred that it was contracted and agreed, by and between the plaintiff and defendant, that the cheeses made in said dairy should all be delivered at the place aforesaid, as fast as they would do to go to market, and all were to be delivered during the season of 1859; that the defendant refused to deliver any portion of the said sixteen thousand pounds of cheese upon said contract, and refused to perform the said contract, and sold the cheese and delivered the same to other parties; that the said sixteen thousand pounds of cheese which the defendant was to have delivered under said contract, and which he as aforesaid had refused to deliver, was worth at the place of delivery, at the time aforesaid, eleven cents per pound. And the plaintiff alleged that he had sustained damages by reason of the breach of the contract aforesaid, on the part of the defendant, to the amount of five hundred dollars. Wherefore he demanded judgment against the defendant for that sum, with costs.

The answer was a general denial of the matters stated in the complaint.

The issue was brought to trial before Hon. WILLIAM F. ALLEN, justice of the supreme court, at a circuit court held at Herkimer, in April, 1860. Thomas W. Moore was sworn

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and examined as a witness on the part of the plaintiff, and testified as follows: "I was buying and sending cheese, in 1859, as the agent of the plaintiff, who resides at Mohawk, Herkimer county. I was present at a bargain made for the defendant's dairy of cheese, May, 1859, at defendant's house. Defendant, Mr. Jacobson and I were present. Mr. Jacobson resides at Mohawk. This was on the 14th day of May. We went into the cheese house and examined his dairy. His price was eight cents; we finally settled upon eight cents. It was to be a good dairy; it was a dairy of between thirty-three and forty cows. The defendant was to deliver the cheese at the Oneida depot. He was to take off one load in a few days, and I was to come around and pay him for it; the balance he was to deliver from time to time, as we ordered it. He was to hold his cheese, up to the number of one hundred, whenever we desired it. We were to pay cash on delivery at the Oneida depot, for all except the first load. The bargain was for the whole dairy, for the whole season. The defendant delivered the first load, amounting to about one hundred and four dollars, on the 30th day of May, and I paid him for it. He delivered another load on the 22d day of June, according to my directions. The amount was twelve hundred and fifty-five pounds, for which I paid him, on delivery, one hundred dollars and forty cents. I saw the defendant next on the 9th day of August. I went to examine the cheese, to see if any would do to go to market. He then had in all sixty-eight cheese on hand. The weather was warm, and they were not fit to go. I met the defendant in the road, and told him that I came around with the intention of taking some of the cheese the next day, but that I thought they would not do to go. The defendant was anxious to have me take some then. I told him I would be there again in two weeks, but I would not promise to take any then, if the weather should continue warm. The defendant said, get around as soon as you can. I was there again on the 22d, and found he had sold. He would have had on that day

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eighty-two cheese, if he had kept them all on hand. When we first arrived there the defendant was not at home; he came home soon, and said he had carried off a load that day; and he said he had sold his dairy to Mr. Leland. I told him I did not think it possible, and said to him, you do not deny that you was to hold, up to one hundred—to which defendant said nothing. I told the defendant that the plaintiff would hold him responsible. I told him I would not say any thing about the load sent off, if he would bring the rest. The defendant made no reply." On his cross-examination, the witness further testified: "After the first load, we were to pay on delivery at the Oneida depot. If we did not direct otherwise, defendant was to hold up to one hundred cheese. We were not to take off the June cheese, unless we chose to." Other testimony was introduced, confirmatory of the above.

It was admitted by the defendant that the amount of cheese made by him, not delivered to the plaintiff, was 9817 pounds.

Thomas W. Moore testified that the defendant would have had one hundred cheese on hand the 10th or 11th of September, if he had not disposed of it to other parties. On the 22d of August, cheese was worth, at Oneida, $8\frac{1}{2}$ to 9 cents per pound; on the 10th of September, 9 or $9\frac{1}{2}$; October 1st, 10 cents; 1st of November, $10\frac{1}{2}$; 1st of December, $10\frac{1}{2}$. John Crist, the plaintiff, was sworn and examined on his own behalf, and testified that he had been an extensive dealer in cheese for several years. "The contract for this cheese was made by my agents; I was well acquainted with the value of cheese at Oneida last season, and bought a good deal of cheese there; on the 22d of August it was worth 9 cents; September 10th, $9\frac{1}{2}$ to 10; October 1st, $10\frac{1}{4}$ cents; November 1st, $10\frac{1}{4}$ cents; December 1st, $10\frac{1}{4}$ cents." It was admitted that the load of cheese sold by the defendant in August, amounted to seventeen hundred and thirty-five pounds; and it was agreed that the damage upon the said load was ten dollars.

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Both parties rested, upon the above facts. The plaintiff claimed that he was entitled to recover damages on the balance of the said cheese, to wit, nine thousand eight hundred and seventeen pounds; and that the measure of damages should be the difference between the contract price and the actual value of the said cheese, at the time when the plaintiff was entitled to have the same delivered under the contract. The defendant moved and insisted that the plaintiff could only recover damages upon the one load of cheese sold in August; and insisted that it was the duty of the plaintiff to have demanded the cheese in question; and to have proved that he was ready and willing to take and receive each parcel of said cheese, and pay for the same at the contract price at the place of delivery; and that the proof did not show that the defendant was liable for damage on any portion of said cheese, except the said one load. The plaintiff insisted that having, by his agent, called upon the defendant for the cheese on the 22d of August, 1859, and the defendant having told such agent that he had sold the entire dairy of cheese, and had that day delivered one load, that was a sufficient demand and compliance with the contract on the part of the plaintiff; and that it was not necessary for the plaintiff to make any further demand, or offer to pay for the said cheese or any part thereof. And the plaintiff further insisted, that from the facts proved and admitted, it was a question of fact for the jury to decide as to whether or not there had been a sufficient demand of the cheese, and offer to pay upon the contract; and also whether or not a waiver of demand and payment might be inferred from the declarations and conduct of the defendant on the 22d day of August, 1859. And the counsel for the plaintiff also insisted, that inasmuch as the defendant informed the plaintiff's agent that he had sold his cheese to another party, and had, as the plaintiff claims, in fact delivered cheese to another party, and refused to deliver any more to the plaintiff, no further performance, or offer of performance, was necessary on the part of the plaintiff.

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The court decided, as matter of law, that the plaintiff could only recover damages upon the one load of cheese sold and delivered on the 22d of August; to which ruling and decision the plaintiff's counsel excepted. And the plaintiff's counsel having insisted upon the right to go to the jury upon the question whether the defendant had absolutely refused to perform the contract, the court ruled and decided that there was no absolute refusal by the defendant to perform, and no evidence upon that question to be submitted to the jury; to which ruling and decision the plaintiff's counsel excepted. The court also ruled and decided, as matter of law, that the plaintiff had not by performance, or offer of performance on his part, put himself in a situation to hold the defendant liable, or to recover damages for the non-delivery of the remainder of the dairy, or more than the said one load of cheese; to which ruling and decision the plaintiff's counsel excepted. The court then directed and instructed the jury to find a verdict in favor of the plaintiff for \$10; the damages agreed upon for the non-delivery of the said one load of cheese. And the jury, under the direction of the court, found a verdict in favor of the plaintiff for \$10; to which ruling and decision the plaintiff's counsel excepted. And the court ordered and directed that judgment and all proceedings be stayed until the decision of the court upon a bill of exceptions or a case; and that such bill of exceptions or case be heard in the first instance at the general term. The plaintiff appealed.

A. H. Prescott, for the appellant.

J. E. Terry, for the respondent.

By the Court, MULLIN, J. The contract on which this action was brought, as proved on the trial, was that the defendant agreed to sell, and the plaintiff to purchase, the defendant's dairy of cheese—all he had made during the season

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‘before the making of the contract and all he should thereafter make—to be delivered at Oneida depot, the first load within a few days and the remainder when ordered by the plaintiff. The price was 8 cents per pound, payable on delivery. The defendant was to keep the cheese until they amounted to the number of one hundred, if required to do so by the plaintiff.

As the delivery of the cheese and the payment of the price were concurrent acts, to be performed at the same time and place, neither could maintain an action against the other for non-performance, without performance, or a readiness and offer to perform, on his own part. (*Dunham v. Pettee*, 4 *Seld.* 508.)

The mere omission to perform at the time and place specified in the contract, releases the other party from the contract; but before the latter can maintain an action for the breach, he must aver and prove that he was ready and willing and offered, at the time and place for performance, to perform on his part. (*Dunham v. Pettee*, *supra*.)

Having ascertained what the rights and duties of the parties were, let us in the next place see what was done under the contract. A few days after the making of the contract a load of cheese was delivered upon it, and was paid for by the plaintiff. Subsequently another load was delivered and was paid for at the time of delivery. Thus far the agreement has been fully performed on both sides. On the 9th August the plaintiff’s agent went to the defendant’s house to examine the cheese, and found it not in a condition to be removed, on account of the heat. The defendant was anxious to have it delivered, but the agent would not consent to a delivery at that time, but promised to call in a few days. He returned on the 22d of August, and learned from the defendant that he had sold the cheese, and actually delivered one load in pursuance of such sale.

The plaintiff was entitled by the contract to the whole dairy. The defendant had put it out of his power to per-

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form on his part by delivering the whole, and the plaintiff was thereby released from the agreement. (*Chitty on Contracts*, 427.)

But the plaintiff does not desire to be released. He insists upon performance, or payment of damages for non-performance. In other words, he elects to treat the contract as in full force, and hence he must do what the law requires to be done by him to entitle him to damages from the other party.

As he was bound before the breach to be ready at the time and place of performance to receive and pay for the cheese, so now, after the breach, he must be ready and willing to receive and pay for the cheese, and offer to do so, unless the defendant has by some act of his relieved him from so doing.

There was still another duty which it is probable the plaintiff was bound to perform, and which was a condition precedent to performance by the defendant, and that was to direct when the delivery should be made. The contract does not regulate the time of delivery, but it does provide that the plaintiff may require the defendant to keep the cheese until there are 100 cheeses on hand. And in addition to this, the delivery must be regulated by the season, as it was not safe or proper to deliver new cheese in very warm weather. It is quite clear, therefore, that it was contemplated by the parties, and it is the construction of the agreement, that before the defendant was bound to deliver, the plaintiff must notify him when to do it.

As to the cheese made after the sale by the defendant to some third person, there is no proof of any notice to the defendant as to the time of delivery, and this omission is fatal to the plaintiff's right of action, unless it is excused by the acts of the defendant.

It was conceded on the trial that the defendant was liable for the damages resulting from the non-delivery of the load of cheese sold and delivered on or before the 22d August; indeed there was a verdict rendered for such damages.

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The plaintiff had not tendered performance as to the cheese sold and not delivered, nor does he aver that he was ready and willing to receive and pay for that, as distinguished from the residue of the cheese. If he is excused from averring and proving these matters and the defendant is nevertheless liable, it must be because the defendant, by the sale and delivery of the load, had put it out of his power to perform, and thus excused the plaintiff from all further duty in reference to that portion of the cheese.

It only remains to ascertain whether the sale by the defendant excused the plaintiff from averring and proving a notice to the defendant when to deliver the cheese, and a readiness and offer to perform on his own part, at the time and place for the defendant's performance. It has already been stated that the sale of the load of cheese was such a breach of the contract as justified the plaintiff in abandoning it, but did not relieve him from the duty of performance on his part if he desired to recover damages of the defendant for such breach.

The only other act done by the defendant which can be urged as an excuse by the plaintiff for not performing on his side, is the sale of the whole of the cheese made by the defendant and not delivered to the plaintiff. In 2 *Parsons on Cont.* 188, it is said, "If one, bound to perform a future act, before the time for doing it, declares his intention not to do it, this is no breach of his contract; but if his declaration be not withdrawn when the time comes for the act to be done, it constitutes a sufficient excuse for the default of the other party." If the sale to the stranger and the silence of the defendant, when the plaintiff offered to say nothing about the load delivered if he would deliver the residue of the cheese, could be deemed equivalent to a refusal to further perform the contract, then, although that might not of itself be a breach of the contract, yet it was never recalled, and therefore, within the authority cited, the plaintiff had the right to treat the contract as broken. (*Weaver v. Halsted*,

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.23 *Wend.* 66. *Francht v. Leach*, 5 *Cowen*, 506. *Ripley v. McClean*, 4 *Exch.* 345.)

In the following cases it is held that the mere refusal to perform is not only a breach of the contract, but it gives the other party an immediate right of action for his damages. And he need not wait for the time of performance to arrive before bringing his action. (*Cost v. Ambergate R. R. Co.* 6 *Eng. L. & Eq.* 230. *Hochster v. De Latour*, 20 *id.* 157, and cases cited *supra*.)

In the following cases it is held that when a party puts it out of his power to perform, before the time for performance arrives, the contract is broken, and the other party is entitled to maintain his action, without proving performance or even a readiness to perform. (*Newcomb v. Brackett*, 16 *Mass. Rep.* 161. *Ford v. Tiley*, 13 *Eng. C. L.* 188. *Inhabitants of Taunton v. Caswell*, 4 *Pick.* 275. *Smith v. Lewis*, 24 *Conn. Rep.* 624. *Frost v. Clarkson*, 7 *Cow.* 24. *Lovelock v. Franklyn*, 55 *Eng. C. L.* 371.)

It would seem to follow from these cases that when either party to a contract which provides for performance by both parties at the same time and place, before the time for performance arrives, notifies the other that he will not perform, and does not before the time for performance recall such notice; or if he puts it out of his power to perform on his part; the other party is relieved from averring, or proving performance, or offer to perform. The defendant in this case had sold the cheese and delivered a part. This put it out of his power to perform, and the result is that the plaintiff could maintain his action for such breach, without averring or proving performance, or a readiness or offer to perform.

It is not shown whether the sale to the stranger was or was not valid. But we must, I think, assume that it was a valid sale; but if once shown to be otherwise, I apprehend the defendant would not be entitled to allege it. This precise point was held in the *Inhabitants of Taunton v. Caswell*, (4 *Pick.* 275.)

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I am of the opinion that the learned justice erred in limiting the plaintiff's right of recovery to the damages for the load sold and delivered to the stranger, and that the judgment should be reversed and a new trial granted; costs to abide the event.

[ONONDAGA GENERAL TERM, January 5, 1861. *Bacon, Allen, Mullin and Morgan, Justices.*]

SARAH FORSYTH, adm'x, and JAMES R. JESSUP, adm'r, &c.
vs. JOHN F. RATHBONE, executor, &c. and others.

A testator, by his will, gave several pecuniary legacies to different relatives; an annuity of \$5000 to his widow; an annuity of \$3000 to his son D.; and after reciting the death of his son W., who had left a widow and four children him surviving, for whose support and maintenance the testator was desirous to provide, he gave to the said grandchildren six stores, in Albany, and to their mother the rents thereof until the youngest of said grandchildren should arrive at the age of 21; upon the happening of which event he gave to his said daughter-in-law an annuity of \$1000, so long as she should remain the widow of W., in lieu of said rents. The whole estate of the testator, other than that portion of it specifically devised, was, after the payment of the legacies, to constitute the general fund, out of which the annuities were to be paid. By the 14th section of the will, the testator desired that his executor should not hasten the sales of any of the real estate, any farther than he should deem for the best interest of the testator's estate; and in case there should remain a surplus of profits arising from stock and other property, after paying the annuities, the executor was directed to reinvest, either in good stocks or on bond and mortgage, such surpluses, from time to time, which should be added to the general fund. By the 16th section, the testator directed that after the death of his wife, his executor should set apart from the general fund sufficient of the best and most reliable securities, from the annual profits of which the annuities to D. and the widow of W. were to be paid. He then devised and bequeathed all the rest, residue and remainder of his estate, not otherwise devised or disposed of, by his will, "to all his grandchildren, share and share alike." The testator then repeated the same devise, in effect, in these words: "And after the decease of my son D. and of my said daughter-in-law, all the rest, residue and remainder of my estate, whether real or

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personal, I give, devise and bequeath the same to all my grandchildren, to be equally divided between them, share and share alike." By a codicil to the will, the testator directed that upon the death of his wife the whole income of the general fund mentioned in the 16th section, except so much as should be required for the payment of the annuities, should be reinvested and accumulate until his youngest grandchild mentioned in the will should arrive at the age of twenty-one years. That from and after that event, the whole income of said fund should be equally divided between his said grandchildren, until the death of his son D. and the widow of W., and upon the death of both of them the final division of the estate between the grandchildren should be made. By another codicil, the testator authorized and empowered his executor, in case of the marriage of either of the granddaughters, before the time arrived for the division of the estate, to advance to such granddaughter, out of the share of the estate to which she would be entitled, a sum not exceeding \$6000; also, to advance to his grandson R., on his arriving at the age of twenty-one years and desiring to engage in business, a sum not exceeding \$10,000; and the annuity of \$1000 to his daughter-in-law was directed to be continued and paid to her during life.

- Held* 1. That the testator having *directed* his executor to sell all his real estate, not specifically devised, all the real estate not so devised was to be considered as converted into money from the time of the testator's death.
2. That by the terms "all my grandchildren," in the 16th section, the testator meant the four children of his deceased son W., who survived the testator.
 3. That the devise or bequest to the grandchildren, in the 16th section, though in form a future devise or bequest, was in effect a present devise or bequest; and by it the four grandchildren of the testator, on his death, took equal *vested* interests.
 4. That the 16th section of the will was, substantially and in effect, a bequest of the whole general fund contemplated by, and to be constructed under, the will, to the four grandchildren, in equal shares, subject to the annuities, and to the trusts and guardian care created by the will and vested in the executor, in and over the fund.
 5. That from the whole will, including the codicils, it was plain that the testator intended that the final division of the general fund, out of which the annuities were to be paid, should be postponed until after the death of the three annuitants.
 6. That the will created a trust. That the whole estate, except that specifically devised or bequeathed, was to be considered, in the hands of the executor, as money or personal property; and that his office as executor, and the duties imposed upon him by the will, as such, necessarily called for and implied a trust in him; and showed that the testator intended the executor should have the custody and management, and legal title, of the fund, until the final division; and that he should keep it together until such final division.
 7. That the direction that the surplus interest or income should be accumu-

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- lated for the benefit of all the grandchildren, until the youngest attained his or her majority, was void, so far as it provided for an accumulation for the benefit of any of the grandchildren after they should have attained their majority.
8. But that this direction for an unlawful accumulation did not affect the validity of the bequest of the fund, or of its surplus income, to the grandchildren. That as the grandchildren severally attained their majority, they would be entitled to their share of the surplus income, notwithstanding the direction for accumulation.
9. That the whole will was valid, except the direction for accumulation for the benefit of grandchildren after they should have attained their majority.

APPEAL from a judgment entered at a special term. On the 8th day of September, 1854, Russell Forsyth, of Albany, physician, executed under his hand and seal, and made and published his last will and testament, bearing date that day, by which he devised and bequeathed as follows :

“*First.* I direct that all my just debts, funeral expenses and charges be paid out of my personal estate, by my executors hereinafter named. *Secondly.* I give, devise and bequeath to my wife Sarah, all my household furniture, together with my plate, books, pictures and ornaments, and all my wearing apparel ; also all my horses, harness, carriages, wagons and sleighs ; also all my farming and garden implements that I may have, with all my cows and young cattle that I may have, upon my homestead place where I reside in Livingston, in the county of Columbia, with full power to dispose of the same by will or otherwise as she shall see fit, and I desire that no inventory be taken of the same. *Thirdly.* I also give, devise and bequeath to my said wife Sarah, my household farm, situate, lying and being in the said town of Livingston, as I purchased the same of Carroll Livingston, containing about seventy acres, be the same more or less, to have and to hold the same to her, my said wife, her heirs or assigns forever, unless I happen to sell and dispose of the same in my lifetime, in which case this devise to be null and void. *Fourthly.* I also give and bequeath to my said wife Sarah, yearly, and every year during her natural life, the

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sum of five thousand dollars; which sum I do hereby direct my executors hereinafter named, yearly to pay to my said wife, in quarterly payments of twelve hundred and fifty dollars every three months, out of a general fund which I will hereafter set apart for that purpose. This provision I have deemed ample and sufficient for the support of my wife during her life, and shall be in lieu of dower on my estate.

Fifthly. In regard to my son, Douglass Forsyth, I desire to make ample provision for his support out of my estate. I do therefore give to my son Douglass, yearly, the sum of three thousand dollars (\$3000) during his natural life; and I direct my executor to pay said sum yearly, in quarter payments of seven hundred and fifty dollars every three months, from the general fund belonging to my estate. And I desire that my son Douglass shall live with my said wife, and be a member of her family, so long as she shall continue house-keeping; and I do hereby cancel and discharge all claims that I have against my son Douglass, and which may be found among my papers after my decease.

Sixthly. I give and bequeath to my sister, Nancy Rathbone, the sum of five hundred dollars, to be paid to her in six months after my decease, by my executor.

Seventhly. I give and bequeath to my niece, Julia Rathbone, daughter of my sister Nancy, the sum of five hundred dollars; which I direct my executor to pay to her within six months after my decease.

Eighthly. I give and bequeath to Eliza B. Seymour, sister of my wife, and now wife of the Rev. Charles G. Somers, the sum of five hundred dollars; which I direct my executor to pay to her in one year after my decease.

Ninthly. I give and bequeath to Catharine Seymour, widow of William H. Seymour, deceased, the sum of five hundred dollars; which amount I direct my executor to pay to her within one year after my decease.

Tenthly. I give and bequeath to Mary Seymour Concklin, daughter of my friend Alfred Concklin, Esq., the sum of five hundred dollars; which amount I direct my executor to pay to her one year after my decease.

Eleventhly.

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I give and bequeath to the New York Baptist Union, for ministerial education, for the endowment of a scholarship in the theological school under its control, the sum of one thousand dollars; which amount I direct my executor to pay within one year after my decease, to the person legally authorized to receive the same. *Twelfthly.* Whereas, I have met with a grievous loss in the death of my son William, who died leaving his widow and four children him surviving; now I am desirous of making ample provision for the support of his said widow, and for the support, education and maintenance of his children: therefore, I give, devise and bequeath unto said grandchildren, the children of my son William W. Forsyth, late of the city of Albany, six brick stores which I own, situate in State street in the city of Albany, in one block, and which cost me sixty thousand dollars; also one dwelling house situate in North Pearl street, which I purchased from Thomas W. Olcott, and which is now occupied by the widow and children of my said son William, and which said dwelling cost me the sum of twenty-five thousand dollars. It is my will and pleasure, and I do so order and direct, that my daughter-in-law, the widow of my son William, shall, so long as she remains the widow of my said son, and until the youngest child of my son William shall attain the full age of twenty-one years, continue to occupy and enjoy my said dwelling house in North Pearl street in Albany, without any charge for rent; and I also direct that the rents arising from my said six brick stores in State street in Albany, shall yearly be paid to my said daughter-in-law, until the youngest child of my son William shall arrive to the age of twenty-one years, to enable her to support, educate and maintain my said grandchildren; and upon the arriving of the full age of twenty-one years of the youngest of my said grandchildren, then I direct that the said six stores and dwelling house shall belong to my said grandchildren, and be possessed and enjoyed by them, share and share alike. And upon the happening of this event, instead of the rents,

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I give to my said daughter-in-law, so long as she shall remain the widow of my said son William, annually, the sum of one thousand dollars; which I direct my executor to pay to my said daughter-in-law in quarterly sums of two hundred and fifty dollars, out of the general fund belonging to my estate. The said six brick stores in State street, and the said dwelling house in Pearl street, in Albany, that I have given to my grandchildren, the children of my son William, I give the same to them and to their heirs and assigns for ever. Whereas, I have made large advances for my son William in his lifetime, now I direct that all claims due to me from the estate of my said son William shall be canceled; and I do hereby cancel the same, and direct that no claim be made upon the estate of my son William for any claim that shall be found among my papers after my decease. *Thirteenth.* Whereas, I am the owner of considerable real estate not devised to either my wife or my grandchildren: now I do hereby direct my executor, hereinafter named, to make sale of all such real estate at such times and for such prices as he shall in his judgment deem for the best interest of my estate. And for that purpose I do herein and hereby empower him, my said executor, to execute and deliver good and sufficient deed or deeds to the purchaser or purchasers thereof, as he shall from time to time make sales; and all the moneys arising from said sales, with all bonds and mortgages or other securities taken in payment thereof, shall go towards forming a general fund belonging to my estate. And to increase said fund, I direct that all demands due to me at my decease, when collected, and all my rail road and bank stock, and property of every description not herein specifically devised by me, shall constitute and form said general fund belonging to my estate, out of which I intend the yearly payments or annuities payable to my said wife Sarah, and to my son Douglass, and to my daughter-in-law the widow of my son William, as mentioned and set forth in this my will, shall be paid by my executor. *Fourteenth.* Whereas, I have perfect

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confidence in the judgment and prudence of my nephew John F. Rathbone, of the city of Albany, whom I intend naming as my executor, I therefore desire that he shall manage my estate in a prudent and judicious manner. And as I believe that I now own of good available stock, the profits from which will yearly meet all claims upon my estate, I therefore desire that my said executor shall not hasten the sales of any of my real estate any faster than he shall deem for the best interest of my estate; and I do further direct my said executor, in case there shall remain a surplus of profits arising from my stock and other property, after paying the yearly demands due to my wife and my son Douglass, and my daughter-in-law, to reinvest, either in good stocks or on bond and mortgage upon good unincumbered real estate, such surpluses from time to time which shall be added to the general fund belonging to my estate. *Fifteenth.* It is further my will and pleasure, and I do hereby reserve the right, to pay any or either of the above legacies, if I shall deem it advisable so to do in my lifetime; and any entry, statement or memorandum upon my books of money having been paid to any or either of the said legatees, shall be deemed full and satisfactory evidence of the same having been paid to such. *Sixteenth.* Whereas, after the death of my wife, there will be and remain a large amount of stocks and property belonging to the general fund of my estate, now I order and direct that there be a sufficient amount of the best and most reliable stocks set apart as a fund, from the annual profits of which the yearly payments to my son Douglass and to my daughter-in-law shall be made; and the rest, residue and remainder of my estate not otherwise devised or disposed of in this my will, I give, devise and bequeath the same to all my grandchildren, share and share alike. And after the decease of my son Douglass and of my said daughter-in-law, all the rest, residue and remainder of my estate, of every name and nature, whether real or personal, I give, devise and bequeath the same

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to all my grandchildren, to be equally divided between them, share and share alike.

I do hereby nominate, constitute and appoint my nephew John F. Rathbone, of the city of Albany, merchant, executor of this my will; and in case of his death during the lifetime of my wife and of my son Douglass and of my daughter-in-law, and before a final distribution of my whole estate, then and in such a case I do hereby nominate, constitute and appoint my friend Ira Harris, of the city of Albany, and my friend Thomas W. Olcott, also of the city of Albany, if living, to act as my executors in the room of and in the stead of my nephew John F. Rathbone.

In regard to my real estate situated in Livingston, Columbia county, not devised to my wife, as it will be inconvenient for my said executor to attend personally to the same, I do hereby nominate and appoint my friend Chas. Esseltine, of Livingston, to act as my agent or the agent of my estate, in leasing the same and collecting the rents from time to time, and making sale of the same under the direction of my said executor; and for all moneys he shall collect as such agent, or in case of a sale to be approved of by my said executor, I direct my said executor to pay one per cent on all rents so collected, and a like per cent on such sale, as a compensation for such agency."

On the 14th day of September, 1854, the testator executed and published the following codicil to said will:

"Whereas doubts may arise in relation to the construction of the sixteenth section of the said will, now therefore, I do hereby declare, and it is my will, that upon the death of my wife the whole income of the general fund therein mentioned, except so much as shall be required for the payment of the annuities to my son Douglass and the widow of my son William, shall be reinvested and accumulate until my youngest grandchild mentioned in said will shall arrive at the age of twenty-one years. That from and after that event the whole income of said fund shall be equally divided between my said

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grandchildren, until the death of my son Douglass and the widow of my son William ; upon the death of both of them, the final division of my estate between my grandchildren shall be made."

On the 23d day of February, 1856, the testator executed and published this further codicil to his will :

"I authorize and empower my executor, in case of the marriage of either of my granddaughters before the time arrives for the division of my estate, to advance to such granddaughter out of the share to which she will be entitled out of my estate, such sum as she may require, in his discretion, not exceeding six thousand dollars.

I also authorize and empower my said executor, in case my grandson Russell shall, upon arriving at the age of twenty-one years, desire to engage in business, to advance to him on account of his share of my estate, such sums as he may think best, not exceeding ten thousand dollars.

I also direct that the annuity of one thousand dollars to my daughter-in-law, for which my will provides, be continued and paid to her during her natural life."

The present action was originally commenced by Douglass Forsyth against the executor, widow and heirs of the testator ; and the plaintiff having subsequently died, the action was revived and continued in the name of the present plaintiffs, his administratrix and administrator

The complaint alleged that about October 28th, 1856, said Russell Forsyth, then a resident of the city of Albany, departed this life at the age of eighty-three years, leaving Sarah Forsyth his widow, and Douglass Forsyth, the plaintiff, his son, Emily Hone Forsyth, Sarah Forsyth, Russell Forsyth and William Forsyth, all under the age of twenty-one years ; the youngest child being about nine years old at the time of the death of the testator ; and children of his son William Forsyth, now deceased, by marriage with Cornelia Kane Forsyth, his only heirs at law and next of kin now living and interested in said will and the property of said testa-

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tor, who are defendants herein ; and leaving a large real and personal estate, to wit, real estate of the value of about four hundred thousand dollars, and personal estate to the value of about one hundred thousand dollars. That said real estate consisted of improved property in the city of Buffalo, in property in Schoharie county, improved real estate in the city of Albany, consisting of stores and dwelling house, and other real estate, all in the state of New York. That about November 25th, 1856, said will and codicils were admitted to probate before the proper officer, in the county of Albany, and an inventory made of his said real and personal property, amounting to about the sum of \$484,000, and duly filed in the proper office of said county. That John F. Rathbone, the executor and trustee named in said will, qualified as such, and by virtue of said will and premises took possession of all said property, except the six stores and dwelling house, and entered upon the execution of said trust. The plaintiff alleged that he was informed and believed that the first twelve sections of said will may be valid in the law, and the legacies therein contained, though he submitted the same to the court ; but that he was advised and believed that the accumulations directed in the 13th section of said will, of the surplus profits of the general fund beyond the yearly demands due to the wife of said testator, his son Douglass, the plaintiff, and his daughter-in-law, as modified and altered in and by the first codicil, are illegal and invalid, inasmuch as they accrue to the benefit of all the grandchildren of the testator, and are not confined to the youngest child of William, and that they are illegal and void. The plaintiff further alleged, that he was advised and believed, and so charged, that the disposition in the 16th section of said will, and in the first codicil, to all the grandchildren, of all and singular the residue of his estate of every kind, including the said surplus profits with the said accumulation as given therein, are illegal, inoperative and void, inasmuch as the same may bind up the residue and render it inalienable for seven lives at least, viz.

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the lives of the widow of the testator, the said widow of William, the said Douglass, and the said four children of William, and also for the life of any other grandchildren who may be born and die in the meantime; and a trust results to the real and personal representatives in law of the testator, who are parties to this action, and who are entitled to have a conveyance thereof from the trustee and executor of said will, as well of the real as personal estate.

The plaintiff further alleges, that said John F. Rathbone, although he knows of the claims of the plaintiff, and of his rights and demands in the premises, as above set forth, claims that said will is in all respects legal and valid, and is proceeding to act in the execution of the trusts therein accordingly.

And the plaintiff alleges, that it is necessary and indispensable, and he demands that this court should settle the true construction of said will, and declare and decree what are the lawful trusts thereof and the rights thereto. And he demands judgment, that when the trusts are thus settled, and his rights in the premises established, the trustee convey and deliver to him whatever he may be decreed to be entitled to, as well under said will, as the lawful, real and personal representative of the testator, and that all necessary parties join in the conveyances; and that said plaintiff may have such other or further judgment or relief in the premises as shall seem fit to this court, together with the costs of the action.

The answer of John F. Rathbone, executor, &c. admits the making, execution and publication of said will and codicils by said Russell Forsyth, the decease of said Russell Forsyth leaving him surviving the plaintiff and the co-defendants, his only heirs at law and next of kin now living and interested in said will, as in the complaint in that behalf is alleged; but denies that the testator left real estate of about the value of four hundred thousand dollars, or exceeding in value about one hundred thousand dollars. Admits that said

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will and codicils were admitted to probate before the proper officer, and that an inventory was made and duly filed, as alleged in said complaint. Admits that he is the executor and trustee named in the will, that he qualified as such, and has entered upon the execution of the trusts, as alleged in the complaint. Defendant says that he is advised and believes that the said will and codicils are, in all respects, legal and valid, and denies that the same, or any part of the provisions therein contained, are illegal or invalid, or in any manner inoperative or void, and submits the same to the court.

The answer of all the other defendants admits the execution and proof of the will and codicils as alleged, but denies that said Russell Forsyth died seised or possessed of real estate of the value of four hundred thousand dollars; and submits to the court, and insists, that the provisions of said will are all valid and legal, and denies that any of its provisions are void and illegal, as alleged in the complaint.

The issue came on to be tried by the court, at a special term thereof, held at the city of New York on the 23d day of June, 1857, before his honor Justice ROOSEVELT. The only question of fact being the amount left by the testator at the time of his death of real and personal estate, it was admitted by the parties that the real estate was one hundred thousand dollars, and the personal property four hundred thousand dollars; whereupon the questions of law arising in the case were argued before the court by counsel for the respective parties, and the case submitted to said court for its decision.

The following opinion was delivered by the justice before whom the issue was tried:

ROOSEVELT, J. "The plaintiff, who is son of the late Russell Forsyth of the city of Albany, has instituted the present suit to set aside the material provisions of his father's will, on the ground of their illegal non-conformity to the

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rules of law regulating the power of testators to fetter their estates after their decease.

At the time his father's will was made, (I mention the circumstance as throwing some light on its seemingly unequal provisions,) the plaintiff was, and for nearly forty years had continued to be, as he still is, a childless bachelor. His father also, without explanation, seems to have assumed it as a settled fact that the plaintiff, although certainly not too old to change, never would marry. For while he carefully provides for the widow and children then living of the plaintiff's deceased brother, he makes no allusion to any possible wife, widow or children of the plaintiff himself—an omission still more significant, when viewed in connection with the following language:

"Fifthly. In regard to my son Douglass Forsyth, I desire to make ample provision for his support out of my estate. I do therefore give to my son Douglass, yearly, the sum of three thousand dollars during his natural life; and I direct my executor to pay said sum yearly, in quarterly payments, &c.; and I desire that my son Douglass shall live with my said wife, and be a member of her family, so long as she shall continue housekeeping."

The plaintiff, although still a bachelor, and without averring the slightest probability, or intention, of ever becoming a parent, complains of the preference shown to his deceased brother's children, who were actually born and in being, and for that reason, but not on that ground, seeks to defeat his father's testamentary intentions.

Personal property, it is conceded, may be tied up by will for two existing lives, and its income for two, or more, existing minorities. A parent, for instance, may place his stocks and mortgages in the hands of a trustee, for the benefit of his married daughter during her life, and of her husband, after her death, with directions, on the death of both, to transfer the securities to such of their children *as may then be living*—a contingency which, as it cannot be determined

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till both are dead, necessarily leaves the ownership uncertain, and of course the power of absolute disposition suspended, during their two lives.

Or in case of a minor child, otherwise well provided for, he may direct that the income given to him shall be accumulated for his benefit; in other words, that neither he nor his guardian for him shall spend it, or have the power of doing so, till he arrives of age. But all attempts by testators, except in one instance of real estate, to exercise a *post mortem* control over their worldly goods beyond those limits, are illegal and void. And the question is, Does the will before us sin in this particular?

Russell Forsyth, the father, died in Albany on the 28th October, 1856, possessed of an estate, mainly personal, valued at half a million of dollars, and leaving, as already stated, a widow, one son, the plaintiff, unmarried, and about forty years old, and four children of a deceased son, all minors.

No dispute exists as to the capacity of the testator, or his due execution of the instrument. The only point presented relates to his intentions, and their alleged inconsistency with the rules of law.

The leading object of the testator appears to have been to provide a "liberal support, for life, for his widow and surviving son, and the widow of his deceased son, and subject to those charges or annuities, to give the whole estate to the grandchildren in fee." Such a disposition, although seemingly harsh toward his only surviving son, of itself would be clearly valid.

It is insisted, however, on his part, and these are made the only grounds of his complaint, first, that the accumulations directed in the 13th (meaning 14th) sections, of the surplus income, for the benefit of all the grandchildren, possible as well as actual, instead of the youngest one living, were for that reason illegal and void; and secondly, that the disposition in the 16th section (as modified by the codicil) in favor of all the grandchildren, of the whole residuary estate, including

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the supposed illegal accumulations, "may bind up the residue, and render it inalienable for seven lives at least, and also for the life of any other grandchildren who may be born and die in the meantime," and for that reason is illegal and void.

The law, to a certain extent, permits testamentary accumulations. They can be directed "for the benefit of one or more minors," but the minors must be "in being at the death of the testator," and the accumulations "must terminate at the expiration of their minority." (1 R. S. 726, 774.) In the present case the accumulations were directed to "be added to the general fund," and that general fund, subject to the annuities, was afterwards given "to all my (the testator's) grandchildren, share and share alike." They were, therefore, in the language of the statute, to be made for the benefit of "one or more minors," even if grandchildren afterwards to be born, should be considered as included in the bequest. Such after-born grandchildren, however, would, of course, not be minors "in being at the testator's death."

But the whole tenor of the will shows that the testator did not contemplate any other grandchildren than the then born "children of his son William," whose death he lamented as "a grievous loss," and for the support of whose widow, and "the support, education, and maintenance of whose four surviving children," he expressed himself so "desirous of making ample provision." It is obvious, also, from the composition of the instrument, and the name of one of the attesting witnesses, that it was worded with distinguished professional skill, by a draftsman who knew the law, and knew that accumulations must be confined to minors *in being*.

Both testator and counsel, for some reason unexplained, assumed that the bachelor son of forty would have no children, and that the children of his deceased brother would be the legal and natural representatives of their surviving uncle, as well as of their deceased father and grandfather. When, therefore, the will speaks of "all my grandchildren," it ob-

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viously means "all the children of my son William;" the property to be divided equally, as distinguished from any partial distribution among them. The testator intended not only that they alone were to be the distributees, but that they were to be so, "all equally, share and share alike."

Besides, were the meaning otherwise ambiguous, the law would require the court to give to the language that interpretation which would render the provision valid, and not void; illegal intention is not to be presumed, but proved. Presumption, if resorted to at all, is in favor of innocence. If, then, to provide for accumulation to benefit unborn, possible grandchildren, would be an illegal direction, we are not to presume that the testator, by the terms "my youngest grandchild mentioned in said will," intended a person different from one of the four children of William actually mentioned, and in being—a person, who, probably, perhaps certainly, never would come into being—a person different from "the youngest child of my son William," (see § 12,) the time of whose "attaining the full age of twenty-one years" was to be the period of division, and who, in the will, was indiscriminately called the youngest of William's children, and "the youngest of my said grandchildren."

The result, then, is that by the 16th section of his will, the testator gives the whole "general fund" of his estate to the four "grandchildren" mentioned "by him in the will, and described as the children of his deceased son William, subject to the three annuities of \$5,000, \$3,000, and \$1,000." That this devise vested absolutely, in interest, "in the said grandchildren" on the day of the testator's death, and carried with it, as incident to the capital, an immediate right to the whole surplus income as it accrued, to be paid to the guardians of the minors, and to be accumulated by them for the benefit of their wards.

That the effect of the codicil, expressly directing accumulation, was merely to substitute, in this respect, the executor for the guardian, and to continue, as to the older grandchild-

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dren, the accumulation of their income until the youngest should arrive at the age of twenty-one years.

That as the statute allows an accumulation for the benefit of more than one minor to "terminate at the expiration of their minority," (§ 3,) the accumulation seemingly may continue till all are of age; but if not, and if the provision in the codicil should be construed as directing "an accumulation for a longer term than the minority of the persons intended to be benefited thereby," the consequence would be, "not that the 'direction' would be void wholly," but "void only as respects the time beyond such minority," (§ 4,) leaving the rest to stand, and leaving to the adults, as they come of age, the right to take their respective shares, discharged from the void part of the direction, and to dispose of them at their own pleasure, without restraint, and without the intervention of a trust.

That provision for the payment of annuities out of the interest and dividends of personal property, if the beneficiaries are actually in being, and not to be born, creates no suspension of the power of alienation. Such annuities are in the nature of trust mortgages, payable by installments, and may be released or sold for the sum in gross, and the capital may at any time be disposed of with the consent of the annuitants.

That, although a direction to accumulate income may create, as it does, a partial suspension of the power of alienation, it does not, on that ground, come within the general laws of suspension, but is regulated by the special enactment in section 4, above cited, in relation to accumulations.

A decree should be entered, dismissing the complaint, without costs, unless the parties should desire the insertion of special direction, in which case they will prepare a draft and submit it for settlement."

The court accordingly rendered its decision, adjudging the will to be, in all respects, legal and valid, and dismissing the complaint without costs.

The plaintiff appealed to the general term.

Forsyth & Bathbone.

Alexander W. Bradford, for the plaintiff.

John H. Reynolds, for the defendants.

By the Court, SUTHERLAND, J. The testator directs his executor to sell all his real estate, not specifically devised to his widow, or grandchildren; and therefore all his real estate, except that so specifically devised, is to be considered as converted into money from the time of the testator's death. (*Stagg v. Jackson*, 1 N. Y. Rep. 206.)

The proceeds of the sale of the real estate is to go towards forming the general fund belonging to his estate, spoken of by the testator; and into the same fund, to increase it, is to go all his stock and property of every description, not specifically devised.

The testator gives several pecuniary legacies to different relatives; an annuity of \$5000 to his widow; an annuity of \$3000 to his son Douglass; and upon the majority of the youngest child of his deceased son William, he gives the widow of William, in lieu of the rent of the stores in Albany, specifically devised to his grandchildren, the children of his son William, an annuity of \$1000. These annuities are to be paid by the executor out of the general fund.

The whole estate of the testator, other than that portion of it specifically devised, after the payment of the sundry small legacies to his relatives, is to constitute the general fund out of which the annuities are to be paid.

By the sixteenth section of the will the testator, after the death of his wife, directs his executor to set apart from the general fund sufficient of the best and most reliable securities, from the annual profits of which, the annuities to Douglass and the widow of William are to be paid. He then devises and bequeaths all the rest, residue and remainder of his estate, not otherwise devised or disposed of, by his will, "to all his grandchildren, share and share alike." The testator then repeats the same devise, in effect, in these words:

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“And after the decease of my son Douglass and of my said daughter-in-law, all the rest, residue and remainder of my estate, whether real or personal, I give, devise and bequeath the same to all my grandchildren, to be equally divided between them, share and share alike.”

After looking carefully at the whole will, and the conceded facts in the case I think the testator meant, by “all my grandchildren,” the four children of his deceased son William, who survived the testator.

The devise or bequest by the sixteenth section of the will, to the grandchildren, though in form a future devise or bequest, “after the death of my wife,” and “after the decease of my son Douglass and of my said daughter-in-law,” is in effect a present devise or bequest; and by it the four grandchildren of the testator, on his death, took equal *vested* interests. (*Vanderheyden v. Crandall*, 2 *Denio* 19, and *authorities cited. Fearne’s Con. Rem.* 368, &c.)

The sixteenth section of the will is, substantially and in effect, a bequest of the whole general fund contemplated by, and to be constructed under, the will, to the four grandchildren, in equal shares, subject to the annuities, and to the trusts and guardian care created by the will, and vested in the executor in and over the fund.

If one of the grandchildren had died the next day after the testator, intestate, his or her share, or interest, would have gone to his or her next of kin, by the law of distribution, and not under any limitation or provision of the will; for there is no limitation or provision which could have carried it.

It would appear from the fourteenth section of the will, the desire therein expressed that the executor should not hasten the sales of the real estate, and the direction for the reinvestment of the surplus income therein given, without reference to the codicils, that the testator probably intended that the division of the fund among his grandchildren should be postponed until after the death of his wife, of his son

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Douglass, and of the widow of his son William. But, whatever might have been the construction of the will, as to this point, had there been no codicil, by the first codicil the testator, assuming that his wife would not survive either his son Douglass or William's widow, expressly declares that "*upon the death of both of them,*" the final division of his estate between his grandchildren shall be made.

From the whole will, including *both* codicils, (for the second codicil points forcibly to the same intention,) I think it plain that the testator intended that the final division of the general fund, out of which the annuities were to be paid, should be postponed until after the death of the three annuitants.

But this mere postponement of the division or *possession* of the fund itself did not, and could not, prevent the grandchildren's interest in that fund, or their right to such future division and possession, from vesting absolutely in them on the death of the testator; and if such interest, or right, so vested, why can they not, as they severally attain their majority, absolutely alienate or dispose of such interest or right?

If the postponement of the final division, or possession of the fund itself, contemplated by the testator, is forbidden by any law against perpetuities, such unlawful postponement cannot impair or affect the absolute bequest of the fund to the grandchildren; but the court should hasten the division; so that the grandchildren, as they severally attained their majority, would take his or her share of so much of the general fund as should not be wanted for the annuities; and as the annuitants severally died, so much of the fund as had been required for his or her annuity would be released for a division among the grandchildren.

It is perfectly plain to me that the will creates a trust. The executor took, as executor, all the personal property, except that specifically bequeathed. The testator directs the executor sooner or later to sell all his real estate, except that specifically devised. The whole estate then, except that spe-

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cifically devised or bequeathed, is to be considered, in the hands of the executor, as money or personal property. His office as executor, and the duties imposed upon him by the will as such—in providing for and paying the annuities; in reinvesting the surplus income, until the youngest grandchild should arrive at the age of twenty-one; and after that, in paying the whole income, except so much as should be required to pay the annuities, to the grandchildren, until the final division of the fund; and in making such division—necessarily call for, and imply, a trust in the executor; and show that the testator intended that the executor should have the custody and management, and legal title, of the fund, until the final division; and that he should keep it together until such final division.

Being a trust of money or personal property only, and not for any illegal purpose, unless perhaps an unlawful accumulation of interest or income, the trust is not affected by the provisions of the revised statutes abolishing trusts except certain express trusts, which apply only to real estate, and is valid for all purposes except such unlawful accumulation. But, although valid, I do not see how *it* can render the vested beneficial interests of the grandchildren inalienable; or has any bearing on the question of perpetuity. Section 63 of the article of the revised statutes concerning uses and trusts, making the interest of a person beneficially interested in a trust for the receipt of the rents and profits of lands, inalienable, (1 *R. S.* 730,) applies only to the interest of a person beneficially interested in a trust for the receipt of the rents and profits of lands, and not to the interest of a person beneficially interested in a trust for the receipt of the interest or income of money or personal property. None of the provisions of that article apply to personal property. (*Kane v. Gott*, 24 *Wend.* 661. *Savage v. Burnham*, 17 *N. Y. Rep.* 571.)

By section 1 of the title of the revised statutes concerning the accumulations of personal property, and of expectant estates in such property, the absolute ownership of personal

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property shall not be suspended by any limitation or condition whatever, for a longer period than during two lives in being, &c. And section 2 declares that limitations of future or contingent interests in personal property shall be subject to the rules prescribed in relation to future estates in land.

The interests of the grandchildren in the general fund, or the income thereof, given to them by this will, are not future, or contingent, but present and vested.

It would appear that the absolute ownership of personal property can only be suspended by means of a contingent limitation of a future estate or interest. There is no contingent limitation of any future estate or interest, by this will. There is an unlawful accumulation of interest or income intended and directed by the will. The testator directs the surplus interest or income to be accumulated for the benefit of all the grandchildren, until the youngest attains his or her majority. Such accumulation, if fully carried out, would not be for the benefit of minors, exclusively. The direction is therefore void, so far as it directs an accumulation for the benefit of any of the grandchildren, after they have attained their majority.

But this direction for an unlawful accumulation does not affect the validity of the bequest of the fund, or of its surplus income, to the grandchildren. As the grandchildren severally attain their majority they will be entitled to their share of the surplus income, notwithstanding the direction for accumulation.

My conclusion is that the whole will is valid, except this direction for accumulation for the benefit of grandchildren after they have attained their majority; and that the judgment of the special term should be affirmed in all respects except in adjudging *all* the provisions of the will to be valid.

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NEW YORK *vs.* HINMAN and others.

The term "next of kin," as used in the section of the statute authorizing actions to be brought against the next of kin of any deceased person, to recover the value of any assets that may have been paid to them by an executor or administrator, means those to whom, under the statute of distributions, the personal estate of the deceased would pass. It therefore includes the widow of the deceased.

Where the shares of the estate belonging to infants have been paid over to their general guardians, the action is properly brought against the infants; and the judgment should direct the money to be paid out of the funds in the hands of the guardians.

Mere delay in foreclosing a mortgage, without any request or notice to foreclose, and where the interest has been paid, is not enough to charge upon the mortgagees the consequences of a fall in the value of the mortgaged property.

The sale, by a widow, of her interest in the assets decreed by the surrogate to be paid over to the next of kin, by the administrator, will leave her liable to creditors of the estate, for the amount of assets received by her assignee, to the same extent as if the same had been received by herself.

If the widow has married again, her husband is not a necessary or proper party to an action brought against her, by a creditor of the estate, for the purpose of recovering the value of assets paid over to her as one of the next of kin, by the administrator.

IN June, 1851, Thomas Lewis executed to the plaintiffs a bond conditioned for the payment of \$20,000 and interest, which bond was secured by a mortgage upon five lots, in the county of Kings, made by the said Thomas Lewis and Clarissa C. his wife. Thomas Lewis died intestate, leaving him surviving his widow, Clarissa C. Lewis, who afterwards intermarried with the defendant Richard H. Hinman; also Clara C. Lewis, Charles P. Lewis and Thomas S. Lewis, infant children, and Joseph B. Lewis, who afterwards assigned his interest in the decedent's estate to William Hutton. In August, 1854, Andrew V. Stout was appointed administrator of the said Thomas Lewis, and interest on the bond was paid to July 1st, 1855. And on the 1st of May, 1856, the plaintiffs commenced an action to foreclose the mortgage, making the administrator a party. The premises were regu-

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larly sold at public auction, by the sheriff, on the third of November, 1856, in presence of the defendant Richard H. Hinman, and the guardian *ad litem* of the infant defendants, and others. The sheriff reported a deficiency of \$7674.14, for which judgment was docketed against the administrator on the 17th of November, 1856, and an execution issued on the judgment, to the sheriff of Kings county, on the 18th of November, 1856. The accounts of the administrator were finally settled on the 11th of July, 1856, and the assets decreed to be paid as follows: To the defendant, Clarissa C. Hinman, \$18,109.13; and to each of the defendants, Clara C., Charles P. and Thomas S. Lewis, \$9054.57. Clarissa C. Hinman's share was in fact paid to Solomon Handford, who had advanced her money, and to whom she had assigned it; and the shares of the others were paid to their general guardian. This action was brought under § 23 of the statute relative to suits by and against legatees, and against next of kin, heirs and devisees, &c. (3 R. S. 5th ed. 748,) to recover the deficiency.(a) The complaint contained substantially the facts above set forth. The answer of the infant defendants by their guardian *ad litem* contained a general denial, and alleged laches on the plaintiffs' part, and other outstanding debts of the decedent. The answer of Hinman and wife was served November 27, 1857, and denied that Mrs. Hinman was next of kin to Thomas Lewis, deceased, or that her husband received any of the decedent's estate as next of kin, or that she had any separate estate, or that execution was duly issued against the administrator; and alleged laches on the part of the plaintiffs, and other outstanding claims against decedent. William Hutton did not appear; and as to him, the complaint was dismissed. Joseph

(a) That section is as follows: "Actions against the next of kin of any deceased person, to recover the value of any assets that may have been paid to them by an executor or administrator, may be brought against all of the said relatives jointly, or one or more of them, for the amount received by each of them."

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B. Lewis was not served with process, and did not appear in the action.

Judgment was rendered at special term against all the defendants, except the two last named, for the full amount of the claim, to be apportioned as the statute directs. And from that judgment the defendants appealed.

P. G. Galpin, for the appellants Hinman and wife. The judgment cannot be sustained against Mrs. Hinman. I. She is not contemplated by the statute as being liable, she not being one of the next of kin. (*Nichols v. Savage*, cited 18 Ves. 53. *Garrick v. Lord Camden*, 14 id. 376, 381, 386. *Watt v. Watt*, 3 id. 244. *Bailey v. Wright*, 18 id. 49. *Cholmondey v. Lord Ashburton*, 6 Beav. 86.) (1.) The statute of distribution directs the estate to be distributed to the widow, children, or next of kin, &c. (2 *R. S.* 97, § 75.) (2.) The right of action is given against the next of kin only. (*Id.* 90, § 42.) (3.) Such right being confined by the statute to them, the court cannot by intendment extend it to others not specially embraced in it.

II. The statute further provides, that all mortgages upon lands, &c. shall be paid by the heir to whom they descend, &c. (1 *R. S.* 749, § 4.) (1.) The plaintiffs must show that the heir refused to pay the mortgage, before they can maintain the action. (2.) The request not to foreclose, if any is presumed, must be regarded as being made at the instance of the heirs and for their benefit, and they alone are liable for any deficiency. (3.) The understanding between the plaintiffs and the heirs to delay the foreclosure, is a tacit agreement on the plaintiffs' part to look to the land and the heirs for satisfaction of the mortgage.

III. The plaintiffs do not come within the provisions of the statute, which is for the benefit only of such creditors as may have neglected to present their claims. (2 *R. S.* 90, § 42.) (1.) The plaintiffs presented their claim, which was acknowledged by paying interest upon it; it should, there-

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fore, be disposed of in the same manner as other claims presented. (2.) It makes no difference that the deficiency arose after distribution. The claim having been presented, it was the duty of the administrator to provide against any deficiency. He became personally liable for it, and the plaintiffs must show that they have not only exhausted their remedy against the estate in his hands, but also personally and on his bond.

IV. No valid execution was issued against the administrator. (2 *R. S.* 87, § 32. *Id.* 363, § 3. 9 *Wend.* 448.) There being no valid execution issued, the plaintiffs have not exhausted their remedy, so as to entitle them to maintain this action.

V. The action cannot be maintained against the widow, because it does not appear, nor is it charged, that she has any separate estate. (*Cobine v. St. John*, 12 *Howard*, 336. *Phillips v. Hagadon*, *Id.* 17.) (1.) The evidence shows that she had parted with her interest in the estate of her husband before the distribution took place, and it never came into her possession. (2.) If this was ever a separate estate of hers, it certainly was not so at the time of the commencement of the action. (3.) In order to sustain a suit against a married woman, it must appear that she had a present subsisting estate at the time of its commencement; that she once had one, will not be sufficient. (4.) The estate must also be clearly described, in order to enable the court to make the necessary direction as to its application in satisfaction of the judgment. (*See Cobine v. St. John*, 12 *Howard*, 336.) (5.) The judgment is defective in declaring it a lien upon her separate estate, and directing execution to issue. (6.) An execution cannot issue against a married woman; the only manner a judgment can be enforced against her estate, is by the appointment of a receiver to take charge of it, and apply it in satisfaction of the judgment.

VI. The defendant R. H. Hinman is not a proper party. (1.) The cause of action arose after his marriage with Mrs.

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Hinman ; the case, therefore, does not come within the provisions of the statute of 1853. (2.) The action is not *in rem*. against the estate distributed, but against the next of kin personally. The estate itself is only the measure of liability of each. (3.) The action being personal against them, no right of action accrued until they had received their distributive share of the estate.

R. S. Emmet, guardian *ad litem* for infant defendants.

I. Actions by creditors against next of kin, to recover debts due by an intestate, will only lie against those of the next of kin to whom assets shall have been paid or distributed, (2 *R. S.* 275, § 47,) and by whom such assets shall have been received. (*Id.* 693, § 23.) No part of the assets of Thomas Lewis, deceased, was ever paid to these defendants. Their shares of the assets were paid to their guardian. In all cases where minors are entitled to a share of the personal estate of an intestate, or testator, either as children, next of kin, or legatees, the statute creates a trust whereby the guardian or the surrogate is made the trustee to receive and hold such share, and to apply the income thereof. (2 *R. S.* 276, 283, §§ 51-55, 87.) The minor, during his minority, stands in the relation of *cestui que trust* of the estate. This trust is precisely analogous to a trust created by will, whereby personal property is bequeathed to a trustee, to apply the income thereof to the use of a *cestui que trust*, and to pay over the principal at the expiration of a stated period. The trustee is the legal owner ; the *cestui que trust* the equitable owner of the assets. The minor's legal absolute ownership of the assets is prospective, and contingent upon his coming of age ; until then he has no power to dispose of or control the assets. He can neither compromise or pay the intestate's debts so as to avoid a suit, nor satisfy a judgment if recovered against him. The assets may never come into his hands. They may be wasted or lost by his guardian or trustee. The assets of an intestate, therefore, cannot be said to be paid to

a minor next of kin, or to have been received by him. His receipt of such assets, if ever, is on his coming of age, before which time he is not entitled to receive them. (2 *R. S.* 276, § 55.) The statute being in derogation of the common law so far as it creates a contract between the next of kin and the creditors of the deceased, must be construed strictly. The restriction in the statute of a right of action only against those legatees and next of kin, to whom assets shall have been paid, was intended to apply to cases of this kind where the next of kin or legatees could not, by law, receive the assets.

II. The liability of next of kin to creditors of a deceased intestate, grows out of a statutory contract to pay the debts due by the intestate to the extent of the assets received, which contract, by the next of kin, is implied from their receipt of the assets. The statute creating this liability was not intended to be in derogation of the common law governing the liability of infants. At common law the contracts of an infant were voidable, and subject to be affirmed or disaffirmed upon his coming of age, even though the contract be for the benefit of the infant. (2 *Kent*, 234 *et seq.*) The infant, upon his coming of age, may elect to decline the legacy or distributive share.

III. The real estate mortgaged by the intestate to secure his debt is chargeable as the primary fund for the payment of that debt. (2 *R. S.* 156, § 4. *Johnson v. Corbett*, 11 *Paige*, 265.) The administrators or next of kin are, therefore, if liable at all, only so secondarily and as sureties, and the creditor is bound to use diligence in collecting the debt out of the primary fund. It appears from the pleadings, that the intestate's debt to the plaintiffs became due in the year 1851, and the same was secured by mortgage of real estate; and it appears from the referee's report, that no proceedings were taken by the plaintiffs to collect the debt out of the mortgaged premises until the year 1858. The premises were sold in 1856 for the sum of \$15,660, and between the time when

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the said debt became due and the time of the said sale, the premises were worth at least \$22,500. The failure or neglect of the plaintiffs to collect the debt out of the mortgaged premises when they might have done so, discharges the administrator or next of kin from all liability for any deficiency. (*Johnson v. Corbett*, 11 *Paige*, 265.)

Hopper & Jackson, for the respondent. I. A widow is to her intestate husband one of the "next of kin," or relatives to whom assets are paid or distributed within the meaning of the statute of distributions, (3 *R. S.* 5th ed. 177, § 47,) and of the statute regulating actions against "next of kin." (*Id.* 749, § 23.) (1.) It is assumed in all the cases that the question who shall be included in the term *next of kin*, is one of intention, to be determined from the context. And the question has usually arisen upon the construction of trust deeds or marriage settlements, or in determining by what title the husband surviving the wife takes her choses in action. (*Bailey v. Wright*, 18 *Ves.* 49. *Garrick v. Lord Camden*, 14 *id.* 381. *King v. Dr. Bettesworth*, 2 *Str.* 1111. 2 *Black. Com.* 514. *Merchants' Ins. Co. v. Hinman*, 4 *Abb. Pr. R.* 312.) (2.) It is not only the clear intent of the statute to include the widow under the term *next of kin*, but that is the only possible construction. Creditors may proceed against the "*next of kin*." (3 *R. S.* 5th ed. 749, § 23.) But in cases where she takes the entire surplus, if she were not included, creditors would be remediless. Notice of appraisal is served only on the *next of kin*. (*Id.* 169, §§ 3, 5.) Executor is not liable for assets paid to *next of kin*, after notice. (*Id.* 176, § 44.) Final settlement is proof of moneys paid to *next of kin*. (*Id.* 181, § 71.) The citation for final settlement is to the *next of kin*. (*Id.* 180, § 66.) The right to demand an accounting is confined to *next of kin*. (*Id.* 178, § 57.) The words *next of kin* must here be taken in connection with what follows, and must be held to include all to whom any assets may have been paid. The object of the statute is to

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protect the executor in making distribution, and at the same time protect the rights of creditors having valid claims against the estate. (*Id.* 749, § 23. *Id.* 177, § 47.) The action for contribution given by § 25, would undoubtedly lie against the widow, as one of the “relatives of the testator to whom such assets may have been paid.” All parties take their distributive shares *cum onere*; and the debts of decedent are first to be paid. (*Id.* 183, § 82. *Id.* 749, §§ 23, 24, 25. *Id.* 177, § 47.)

II. It is immaterial whether the distributive shares of the defendants were paid to them personally, or to their authorized agents or assignees, or to some one for their use. The actual recipient of the money was the agent of the person entitled to receive it. And the statute makes the final settlement before the surrogate conclusive. (*Id.* 181, § 71.)

III. The infancy or coverture of the defendants, or that no proof was given that the defendant Mrs. Hinman has a separate estate, is no defense. The debt is made enforceable by statute against all who receive assets, without exception; and no such exceptions can be presumed, for the reasons stated *supra*, first point (2). (1.) In this case the statute creates the liability, and the recipients take their share of the assets, subject to any outstanding debt of the decedent. (2.) Even if no execution could at present be issued against Mrs. Hinman's estate, that does not affect the plaintiffs' right to a judgment. On her death, all her separate estate would become a general trust fund for the payment of all her debts. (*Norton v. Turvill*, 2 P. Will. 144.) (3.) This action is not founded on the supposition that Mrs. Hinman has charged her separate estate by appointment, and such separate estate need not be alleged. Her liability is made general by statute to the extent of the money received, and is not to be distinguished from the liability of the daughters. (3 R. S. 749.) (4.) The infants having received their shares, they cannot avoid the liability thereby incurred, without refunding the money or paying it into court. (2 Kent's Com. 240.

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Roof v. Stafford, 7 Cowen, 179. *Weed v. Beebe*, 21 Verm. R. 495-500. *Hamblett v. Hamblett*, 6 N. Hamp. Rep. 333-339. *Smith v. Evans*, 5 Humph. R. 70. *Bailey v. Barnberger*, 11 B. Mon. Rep. 113-115.)

IV. It is not necessary that an execution should have been issued against the administrator. (3 R. S. 451. *Id.* 176, § 44. *Id.* 177, § 47.) The fund is the same, and the right of contribution remaining, it can make no legal difference to the next of kin; while it would be unreasonable to delay the creditor, particularly after distribution and final settlement. In case of heirs, the fund is different, and the statute makes a distinction. (3 R. S. 750.)

V. The execution was regularly issued. (3 R. S. 174, § 36. *Olmstead v. Vredenburg*, 10 How. Pr. R. 215.)

VI. The plaintiffs used due diligence. The foreclosure suit was regular, and was commenced shortly after the first default in payment of interest.

VII. The property brought its full value. There is no evidence of any depreciation prior to the sale, which was at public auction, under direction of the sheriff, in presence of all parties, and is conclusive evidence of value.

BY THE COURT. The term "next of kin," (in regard to the remedy,) means those to whom, under the statute of distributions, the personal estate of the deceased would pass.

The action is properly brought against the infants where the amount of the estate belonging to them has been paid over to the general guardian. In such a case, the judgment should direct the money to be paid out of the funds in the hands of the guardian.

Mere delay in foreclosing a mortgage, without any request or notice to foreclose, and where the interest has been paid, is not enough to charge upon the mortgagees the consequences of a fall in the value of the property.

The sale by the widow, of her interest in the estate, left

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her liable for the amount of the personal estate received by her assignee, to the same extent as if received by herself.

No judgment should be rendered against the defendant Richard H. Hinman, and the same must be so far modified as to omit any recovery against him.

Judgment modified so as to strike out any recovery against Richard H. Hinman, and to direct the recovery against the infants to be paid out of the moneys in the hands of their guardian.

[NEW YORK GENERAL TERM, May 6, 1861. *Clerke, Gould and Ingraham*, Justices.]

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WARD *vs.* RUCKMAN.

The right of the master to continue in command of a vessel because he is a part owner, can only rest on a contract made with the other owners.

Even if such a contract is made with one captain, it is not an assignable right, to be transferred with the share, but is personal to the captain with whom it was made.

Such a contract cannot be unlimited, in respect to duration; and where no time is fixed for its continuance, it must be considered as subject to be terminated by either party on reasonable notice, if the interest of either requires a change.

ACTION of trover for the illegal conversion by the defendant of the one quarter part of the schooner *Ney*, and also for damages for wrongfully depriving the plaintiff of a "*master's interest*" in said schooner, which was claimed to be the right to run her, as master, and to receive as such master, for so running her, 55 per cent of her gross earnings, in addition to his quarter dividends as part owner. The defendant had not destroyed the schooner, but as owner of three quarters had appointed another master, and employed her as he chose. The means adopted by the defendant to obtain possession of the vessel, it is alleged, was a warrant of attach-

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ment. The answer admitted the issuing of the attachment, but stated the grounds. No evidence whatever was given, or offered, of a *conversion*, but the object of the action was to establish the existence of a kind of property, called a "master's interest," as distinguished from his interest as an owner. Witnesses testified that such an interest was worth from thirty to fifty per cent more than a citizen's interest. The plaintiff derived his title from one De Groote, and the bill of sale conveyed only "*the one quarter of the vessel.*"

The register showed that De Groote owned one-fourth, and the defendant three-fourths.

The complaint was dismissed, and the plaintiff appealed.

J. T. Williams, for the appellant.

G. Dean, for the respondent.

BY THE COURT. The right of a master to continue in command of a vessel because he is part owner, can only rest on a contract made with the other owners.

Even if such a contract is made with one captain, it is not an assignable right to be transferred with the share, but is personal with the captain with whom it is made.

Such a contract cannot be unlimited in respect to duration; and when no time is fixed for its continuance, it must be considered as subject to be terminated by either party on reasonable notice, if the interest of either requires a change. (*Story on Partnership*, § 432. *Card v. Hope*, 2 Barn. & Cress. 661.)

The facts proved on the part of the plaintiff do not show a right to recover, and the complaint was properly dismissed.

Judgment affirmed, with costs.

[NEW YORK GENERAL TERM, May 6, 1861. *Clerke, Ingraham and Gould*, Justices.]

PATTEN, receiver, &c vs. HAZEWELL and wife.

Where a defendant, by his answer, denies all the facts stated in the complaint, judgment cannot be taken against him, even by default, without evidence.

THIS action was brought by the plaintiff as receiver of the defendant George R. Hazewell, appointed in proceedings instituted against him by one Francis Kerter, a judgment debtor of said Hazewell, against Hazewell and his wife, and the complaint prayed for a discovery respecting certain property in Texas and Philadelphia alleged to belong to the wife, and for a judgment or order requiring the defendants to transfer said property to a receiver; that the same might be sold, and that the sum of \$400, or whatever amount of legal interest the plaintiff had in said property, might be paid over to him, with costs, &c. The defendant Sarah H. Hazewell appeared, and put in an answer denying all the material allegations in the complaint. George R. Hazewell did not answer. The action was brought to trial at a special term held in the city of New York, in March, 1859. Neither of the defendants appeared at the trial, and no evidence was produced by either party. Judgment was ordered by the court for the plaintiff, against both defendants, for the amount of the judgment recovered against George R. Hazewell in the Kerter suit, together with interest and costs, or that the defendants, within twenty days, assign and transfer to the plaintiff, as receiver, the real estate in Texas and Philadelphia, by a good and sufficient deed or deeds of conveyance; and that the plaintiff have power and authority to sell the same, &c. The defendants, on a case and exceptions, moved for a new trial.

J. H. Patten, plaintiff, in person.

J. O. Robinson, for the defendants.

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THE COURT decided that where the defendant, by his answer, denies all the facts stated in the complaint, judgment cannot be taken, even by default, without evidence.

Judgment reversed, and new trial ordered; costs to abide the event

[NEW YORK GENERAL TERM, May 6, 1861. *Clerke, Sutherland and Ingraham, Justices.*]

HALSTEAD and others vs. GORDON and McCROSSAN.

A provision, in an assignment for the benefit of creditors, which authorizes the assignee to pay all reasonable expenses, costs, charges and commissions attending the execution thereof, with a reasonable and *lawful* commission for the services of the assignees, does not render the assignment void.

Nor will a clause authorizing the property to be sold at private sale, avoid an assignment.

A clause directing the assignees to sell and dispose of the property at public or private sale, as he may deem most beneficial to the interests of the creditors, is to be understood as applying to the mode of selling; viz. either at public or private sale, and not as authorizing a sale on credit.

THIS action was commenced by the plaintiffs as judgment creditors of James Gordon, to set aside an assignment made by the defendant Gordon to the defendant McCrossan, of his (Gordon's) property, for the benefit of creditors. The action was tried before his honor Justice DAVIES, at special term, without a jury, on the 17th of October, 1859. He adjudged the assignment to be fraudulent and void, by reason of the following provision in the assignment, viz: "And with and out of such sales and collections, that the said party of the second part shall first pay and disburse all the reasonable expenses, costs, charges and commissions attending the due execution of these presents and the carrying into effect the trusts hereby created, together with a

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reasonable and lawful compensation or commission for his own services;" the court at special term holding, that by the provision in question, a commission or compensation was by the assignment to be paid to the assignee, over and above the just and reasonable commission for executing the assignment. The assignment also contained the following clause: "In trust nevertheless, to and for the use, intents and purposes following; that is to say, that the said party of the second part shall take possession of the property hereby assigned, or intended so to be, and shall, with all convenient diligence, sell and dispose of the same at public or private sale as he may deem most beneficial to the interests of the creditors of the said party of the first part, and convert the same into money," &c.

Judgment was given for the plaintiffs at special term, declaring the assignment to be void upon its face, with the usual provisions in similar judgments, with costs.

The defendants appealed.

John C. Dimmick, for the appellant.

Capron & Lake, for the plaintiffs.

BY THE COURT. A voluntary assignment for the benefit of creditors, which authorizes the assignee to pay all reasonable expenses, costs, charges and commissions attending the execution thereof, with a reasonable and *lawful* commission for the assignee's services, is not void. The commissions to the assignee are to be lawful. The other commissions are for persons (auctioneers and others) employed to do the work.

It does not avoid the assignment to authorize the property to be sold at private sale.

There is no authority, in the assignment, to sell on credit. The only direction given to the assignee by the words "*as he may deem most beneficial to the interest of the creditors*,"

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is as to the mode of selling; viz. either at public or private sale, not to selling on credit.

Judgment reversed, and new trial ordered; costs to abide the event.

[NEW YORK GENERAL TERM, June 21, 1861. *Clerke, Ingraham and Leonard, Justices.*]

 WILLETTS *vs.* VANDENBURGH and others.

An action will not lie, in favor of a *simple contract creditor*, against the assignee of the debtor under an assignment for the benefit of creditors, and others, to compel the assignee to account for the assigned property, and to pay the value of property alleged to have been fraudulently left in the hands of the assignor, and by him converted to his own use; to compel another defendant to pay the value of certain property of the assignor, alleged to have been sold at auction, by the assignee, for the benefit of such defendant, for less than its value, by collusion, and without due notice; to compel the defendants to pay the value of other property alleged to have been sold at auction to one of the defendants, for less than its value, by collusion; to compel the assignee to account for and pay the value of lands alleged to have been fraudulently conveyed to him, without consideration, by the assignor, previous to the assignment; to set aside deeds to another defendant, alleged to have been executed by the assignor, before the assignment, as fraudulent and void and without consideration; to compel the delivery of the possession of the premises thus conveyed; and to obtain judgment against the assignee for the amount of the plaintiff's claim. A *judgment* must first be obtained, by the plaintiff, and the remedy at law exhausted, *it seems*.

THIS was an appeal from an order made by Hon. Justice SUTHERLAND, at special term, overruling the demurrers of the defendants to the complaint. The action was brought by the plaintiff, who claims to be a simple contract creditor of one David M. Meserole, now deceased, in a sum amounting at the commencement of this action to about \$87, against the defendant Vandenburgh, who is alleged to be an assignee for benefit of creditors of said Meserole, under an assign-

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ment annexed to the complaint, and against the other defendants, for the following purposes: 1. To compel the assignee to account for the assigned property, and to pay the full value of certain property alleged to have been fraudulently left in the hands of the assignor, and by him converted and appropriated to his own use. 2. To compel the defendant Abraham Meserole to pay the full value of certain property of the assignor, alleged to have been sold at auction to one Knapp for the benefit of said defendant Abraham Meserole, for less than its true value, by collusion between said defendant and said assignee, and without due notice. 3. To compel said defendants to pay the full value of certain property alleged to have been sold at auction to the defendant Abraham Meserole, jun., for less than its value, by collusion as aforesaid. 4. To compel the defendant Vandenburg to account for and pay the full value of certain lands in Kings county, alleged to have been fraudulently conveyed to him, without consideration, by the assignor, *before* the date of the assignment. 5. To set aside a certain deed alleged to have been made *before* the date of the assignment, by the assignor, to the defendant Abraham Meserole, jun., conveying certain lands in Dutchess county, as fraudulent and void and without consideration. 6. To set aside a certain other deed alleged to have been made without consideration, *before* the date of said assignment, by said assignor to said Abraham Meserole, jun., conveying certain lands in Kings county, as fraudulent and void. 7. To compel the said Abraham Meserole, jun., to deliver full and peaceable possession of said premises to said assignor, to be by him accounted for to the creditors of said assignor. 8. To obtain judgment for the plaintiff for the amount of his said claim against the defendant Vandenburg in full, or if assigned estate be not sufficient, then ratably. 9. For such other or further relief as shall be just.

The defendants demurred separately to the complaint upon the following grounds appearing upon the face of said complaint, that is to say:

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“I. That this court has no jurisdiction of the subject of the action; for that, 1st. The matter in dispute does not exceed the value of one hundred dollars. 2d. It does not appear that the plaintiff has brought his action at law, or taken any proceedings for the recovery of his demand against David M. Meserole, named in said complaint, or his estate. II. That there is a defect of parties defendant in said action; because, 1st. The defendant Abraham Meserole, jun., is not a necessary or proper party to said action. 2d. The defendant Abraham Meserole is not a necessary or proper party to said action. 3d. The personal representatives, widow and heirs at law, of David M. Meserole, named in said complaint, are necessary and proper parties to the action. 4th. One Knapp, who is mentioned in said complaint at folios 29 and 30, is a necessary and proper party to said action. III. That several causes of action have been improperly united, in that, 1st. The several causes of action alleged in said complaint do not all arise out of the same transaction, or transactions connected with the same subject of action. 2d. The said alleged causes of action do not all belong to one of the classes specified in section 167 of the code of procedure. 3d. The said several alleged causes of action do not affect all the parties to the said action. 4th. The said several alleged causes of action will require different places of trial, to wit, the county of Dutchess, the county of Kings, and the city and county of New York. 5th. The said several alleged causes of action are not separately stated in said complaint. IV. The said complaint does not state facts sufficient to constitute a cause of action against the defendant.

Theo. F. Jackson, for the appellants.

Geo. Terwilliger, for the plaintiff.

BY THE COURT. The plaintiff, not being a judgment creditor, is not entitled to maintain this action.

In this respect the demurrer is well taken.

Moore v. Remington.

Order appealed from reversed. Judgment ordered for the defendant, on the demurrer, with leave to the plaintiff to amend on payment of costs.

[NEW YORK GENERAL TERM, May 6, 1861. *Clerke, Gould and Ingraham, Justices.*]

JOHN W. MOORE vs. RICHARD REMINGTON.

However discreditable an act may be, in a moral point of view, or as a breach of confidence, it does not follow that the act is on that account to be held a corrupt one, within the meaning of the law, so as to avoid a contract. It must be corrupt as tainted by fraud, or illegal as in violation of some rule of law or some statute, to warrant such a defense.

APPEAL from a judgment entered upon the report of a referee. The complaint was for services rendered, and for money paid out and expended for the defendant, and demanded judgment therefor in the sum of \$315.50 and interest. The answer denied any indebtedness to the plaintiff. The action was referred to a referee, who found the following facts, viz:

That on or about the month of July, 1858, the defendant, Remington, being the owner by purchase of the Dorchester Manufacturing Company, located in the province of New Brunswick, and being desirous to become the owner of a majority of the stock of said company, made an agreement with Thomas B. Moore, at New Brunswick, to come to the city of New York and assist the defendant in obtaining the control of said stock, and that he, the defendant, would pay said Moore his reasonable expenses therefor. That in pursuance of said agreement, Moore came from New Brunswick to the city of New York, in the month of August, 1858, and remained until the 5th day of October, 1858, and rendered said defendant and his attorneys such assistance as he could, in obtaining the control and possession of a majority of the

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stock of said Dorchester Manufacturing Company. That the reasonable expenses incurred by said Thomas B. Moore, while thus engaged in rendering said defendant assistance for the purpose aforesaid, amounted to the sum of \$107.50. That on the 11th day of November, 1859, the said Thomas B. Moore duly assigned the said demand against the defendant, for his expenses, to the plaintiff in this action, who is now the lawful owner of the same.

The deposition of Thomas B. Moore was read on the trial of the action. He testified as follows:

"I was requested by the defendant, in July, 1858, in New Brunswick, to come to New York, at his expense, to assist him with such information as I could afford, in regard to the stock of the Dorchester Manufacturing Company, and particularly to assist him in obtaining the ownership of the stock of John Carnes & Co., through the medium of an attachment to be issued out of some court in New York at the suit of Edward Allison, of St. Johns, New Brunswick, against the said John Carnes & Co., a large number of shares of which stock of said Carnes & Co. was in my possession; it being represented to me by said defendant that the only way it could be reached was by my coming to New York with the certificates of stock which I had, belonging to said Carnes & Co.; I agreed to do as he requested. I came on to New York in the month of August, 1858, and afforded to him and his counsel, Mr. Runkle, all the assistance and information in my power in regard to the stock of Carnes & Co., and the stock of the company. The stock I held of Carnes & Co. was taken from me under an attachment by the sheriff of New York, at the suit of Allison, as devised by the defendant in this action." He further testified that he had no other business in New York; that he was in the employ of the defendant fifty-two days; and that his expenses in coming to New York, while there, and in returning to New Brunswick, were \$107.50. It appeared in evidence that the witness Thomas B. Moore was, at the time of this transaction,

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an attorney and barrister in the supreme court of New Brunswick. Allison, the plaintiff in the attachment suit, was a member of the firm of John Carnes & Co. The plaintiff having rested, the defendant's counsel moved the referee that the complaint and action be dismissed. *First.* On the ground that no cause of action had been made out. *Second.* That there was no proof that Thomas B. Moore ever rendered any services to the defendant. *Third.* That there was no evidence showing what were the expenses of said Moore in traveling from New Brunswick to New York, and back; that there was no proof of said Moore having incurred any expense for board while here, and that the evidence in reference to all his said expenses was of too indefinite a nature to render a report or decision, for any specific amount of damages, possible. *Fourth.* That the agreement in evidence, on which the plaintiff claims, was invalid, inasmuch as the same was contrary to public policy, good morals, and the general policy of the common law, and that the same was consequently absolutely null and void. *Fifth.* That the promise of the defendant to pay the expenses of said Thomas B. Moore was a *nudum pactum*, and wholly without consideration, for the same reasons. All of which objections were overruled by the referee, and the motion to dismiss the complaint and action was denied; to which the counsel for the defendant excepted.

The referee found, as a conclusion of law, that the defendant was indebted to the plaintiff in the sum of \$107.50, with interest thereon from October 5th, 1858, amounting at the date of the report to the sum of \$119.10, for which sum, besides costs, the plaintiff was entitled to judgment.

Various exceptions were taken to the report, and from the judgment entered thereon the defendant appealed.

Barrett, Brinsmade & Barrett, for the appellant.

Boies & Cooper, for the respondent.

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By the Court, INGRAHAM, J. However discreditable an act may be, in a moral point of view, or as a breach of confidence, it does not follow that the act is on that account to be held a corrupt one, within the meaning of the law, so as to avoid a contract. It must be corrupt as tainted by fraud, or illegal as in violation of some rule of law or some statute, to warrant such defense.

Besides, in this case the act was done at the request of one of the partners, which would relieve it from the charge of having been done without any authority.

The claim appears to have been allowed only for actual expenses, or the equivalent therefor. Although board was not actually paid, the evidence showed what the board was worth, and there was no ground for rejecting that item merely because it was not paid. So far as the board was referred to, it may have been paid for in some other way, more expensive to Moore than actually paying the money.

Judgment affirmed, with costs.

[NEW YORK GENERAL TERM, May 6, 1861. *Clerke, Gould and Ingraham*, Justices.]

 BURKE vs. NICHOLS.

The defendant purchased a lot of land of the plaintiff, giving back a mortgage upon the premises, to secure a portion of the purchase money ; and there being, at the time, a dwelling house upon the land, which projected over the adjoining lot, the mortgagor, for the purpose of protecting his title, purchased the adjoining lot. *Held* that upon the mortgagee bringing an action to foreclose the mortgage, the mortgagor could not set up these facts by way of counter-claim, and ask for damages for the portion of the house which stood on the adjoining lot.

THIS was an action for the foreclosure of a mortgage, executed by the defendant to the plaintiff to secure the pay-

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ment of \$1500, a portion of the purchase money of a lot of land in the city of New York. The action was referred to a referee, who found the following facts: That the bond and mortgage mentioned in the complaint were executed by the defendant to the plaintiff, to secure part of the consideration money agreed to be paid by the defendant to the plaintiff upon a conveyance thereof by the plaintiff to the defendant, at the time and in the manner mentioned in the pleadings. That such conveyance contained the covenants on the part of the plaintiff to the defendant of seisin, of right to convey, for peaceable possession, against incumbrances, of further assurance and of warranty set forth and stated in the defendant's answer. That the only fact which the defendant offered or sought to prove on the trial, as a defense or counter-claim and as a breach of the covenants of said deed, was that the easterly side of a dwelling house situate upon the front of the lot and premises particularly described by metes and bounds in such deed, and conveyed thereby, projected over upon other adjoining premises about 15 inches, and that a fence by which the premises conveyed by said deed appeared to be separated from said adjoining premises was entirely upon said adjoining lot, and at the distance of four feet six inches easterly from the easterly boundary of the premises as described in said deed. That said adjoining lot or premises was at the time of said conveyance owned in fee by another person; and that the defendant had been evicted by a paramount title from so much of said house as projected over upon said adjoining lot, and from the entire use and property in said fence standing on said adjoining lot. And the referee found, as matter of law, that the matters so offered to be proved by the defendant constituted no breach of any of the covenants in said deed, and that he was not entitled to recover or be allowed any sum whatever by reason of any of the said matters which he offered to prove as a defense or counter-claim. That he had computed the amount due to the plaintiff on

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said bond and mortgage, and found the sum of sixteen hundred and thirty-six dollars and twenty-five cents ; and that the plaintiff was entitled to a judgment of foreclosure and sale of the mortgaged premises, &c.

G. P. Androus, for the appellant.

C. Patterson, for the respondent.

By the Court, INGRAHAM, J. The defendant was the purchaser from the plaintiff of a lot of ground, and for a part of the consideration money he gave a mortgage thereon. Neither the deed nor the mortgage referred to any building on the premises. There was a house standing on the lot, which projected over the adjoining lot. In consequence thereof the defendant purchased the adjoining lot, and thus became the owner of both lots and of the whole building. The plaintiff now brings an action to foreclose the mortgage, and the defendant sets up, by way of counter-claim, the above facts, on which he asks for damages for the portion of the house which stood on the adjoining lot. On the trial, the referee excluded the evidence offered to prove this counter-claim.

There is no doubt the deed of the lot conveyed every thing standing upon it, whether dwelling or other building, fences, &c., that belonged to the vendor, and if there was any thing attached to the land that belonged to any other person, the vendee could recover damages, under the covenant of seisin. This was settled in the case of *Mott v. Palmer*, (1 Comst. 564,) but that case goes no further. It does not hold, what is necessary for the defendant's counter-claim, that where a house stands upon two lots, a conveyance of either makes the grantor liable for the value of that portion of the house which stands on the adjoining lot.

There is no doubt that previously to the adoption of the code of procedure, any defect of title, where the purchaser remained

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in possession, could not be set up as a defense to a proceeding to foreclose the mortgage. So far as that matter would be a defense, the law remains unchanged, and it is no more a defense now than it was before the code became a law. The only question, therefore, which can arise, is whether the defendant could set up this matter as the foundation of a counter-claim.

In the *National Fire Ins. Co. v. McKay*, (21 N. Y. Rep. 191,) Ch. J. Comstock says, that "a defendant who is personally liable for the debt may probably introduce an offset to reduce or extinguish the claim." This was not necessary to the decision of that case, and it does not appear that the other judges concurred in that expression of opinion. As I understand the case, on that point, there was no decision. It can hardly, therefore, be considered as authority, although entitled to great weight.

But whether such counter-claim was admissible or not, the evidence offered did not show any right to recover against the plaintiff therefor. The deed did not purport to convey any building, by description. Whatever right the defendant had to the buildings on the land conveyed, arose from the principle that a man who conveys a lot conveys every thing standing on the lot and being affixed to the freehold. This would give him title to so much of the house as stood on the lot. We have been referred to no authority to show that it gave any thing more. The cases of lights, overhanging gutters, and other matters of a similar nature, do not apply. They rest on a different principle, which cannot be available in this case; and most if not all of the cases arose between vendor and vendee, where the vendor owned both pieces of land.

We think the defendant gained no title to the portion of the house which did not stand on the lot conveyed to him, and that the plaintiff was not liable because part of the house stood on another lot. The clear intent of the deed was not

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to convey more than one lot, and the rule of construction of deeds is to carry out the intent of the parties.

The defense was properly excluded, and the judgment should be affirmed.

Judgment affirmed, with costs.

[NEW YORK GENERAL TERM, May 27, 1861. *Clerke, Gould and Ingraham*, Justices.]

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BUCKINGHAM vs. ANDREWS.

Where promissory notes, payable to a foreign executor as such, are indorsed by him as executor, to himself in his individual capacity, and he sues thereon in his own name, he is not to be deemed the representative of a deceased person, according to the laws of this state, so as to exclude the defendant from being a witness in his own favor.

He cannot sue, here, in a representative capacity, and can only be regarded as the indorsee of the notes.

THIS was an action on several promissory notes made by the defendant, payable to John Buckingham, executor, &c. of J. M. L. Scovill. The will of the testator was proved in the state of Connecticut, where the plaintiff resided, and letters testamentary were issued to him there. The notes were indorsed by John Buckingham, executor, to John Buckingham in his individual capacity. The suit was commenced on these notes by John Buckingham as an individual, against the defendant, and tried before Judge LEONARD and a jury, on the 12th of June, 1860. On the trial the defendant offered himself as a witness as to transactions between himself and James M. L. Scovill, deceased, of whom John Buckingham was executor. The plaintiff objected to the examination of the defendant as to such transactions, on the ground that the plaintiff is the representative of a deceased person, and, under section 399 of the code, the defendant is, therefore, incompetent as a witness in respect to the said transac-

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tions. The court sustained the objection, and excluded the testimony, under the exception of the defendant. The jury found for the plaintiff a verdict for \$4078.10. The judge directed judgment to be suspended until the hearing by the general term of the question raised by the exceptions.

Cummins, Alexander & Green, for the appellant. I. The judge erred in excluding the testimony of the defendant. (1.) The suit was not by the plaintiff in his representative capacity as executor, but in his individual capacity. (*Sheldon v. Hoy*, 11 *How. Pr. Rep.* 11.) The court had already so decided. The suit could not have been brought by the plaintiff as executor, without taking out letters in this state, the will being probated in Connecticut and plaintiff residing there. (*Dayton on Surrogates*, 205. *Robinson v. Crandall*, 9 *Wend.* 426.) (2.) The code only excludes the testimony of parties to the suit as to transactions with a deceased person, when the party against whom such evidence is sought to be introduced sues in his representative capacity as executor or administrator, &c. of the deceased person. (§ 399 of Code. *Merritt v. Seaman*, 2 *Seld.* 168.)

II. The judge erred in denying the motion to dismiss the complaint.

Wm. E. Curtis, for the plaintiff. I. The court ruled correctly in denying the motion to dismiss the complaint. An executor can maintain a suit, either in his own name or as executor. (*Merritt v. Seaman*, 2 *Seld.* 168.) Where in a similar case an objection was raised to the plaintiff's suing as executor, the court, Ingraham, J., used this language: "The property belongs to the estate; for the proceeds of the note the executor will be required to account, and personally he has no interest in the proceeds. He might have maintained the action in his own name, it is true, but he was not necessarily compelled to do so." (*Eagle v. Fox*, 28 *Barb.* 475.)

II. The court properly excluded the testimony of the de-

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fendant "in respect to any transactions had personally between the deceased and the defendant," using the language of the code, § 399. The plaintiff is clearly the representative of a deceased person. He is both the executor and the trustee under the will of the deceased. The rule established in the case of *Eagle v. Fox*, (*supra*,) is, that though the executor can maintain an action in his own name, he is required to account as executor, and personally has no interest in the proceeds, and is but the representative of the deceased.

III. The motion for a new trial should be denied, and judgment ordered for the plaintiff upon the verdict, with costs.

By the Court, INGRAHAM, J. The plaintiff was not the representative of a deceased person, according to the laws of this state. He could not sue here in a representative capacity, and can only be regarded as the indorsee of the note.

The court therefore erred in excluding the witness.

Judgment reversed and new trial ordered; costs to abide the event.

[NEW YORK GENERAL TERM, May 6, 1861. *Clerke, Gould and Ingraham*, Justices.]

STEINHART vs. BOKER and others.

The old established rule of law that the holder of bills, bank notes, &c., can give a title which he does not possess, to a person taking them *bona fide* for value, is not to be qualified by treating it as essential that the person should take them with due care and caution; except so far as the want of such care and caution may affect the *bona fides* and honesty of the transaction.

Where a bailee, with whom bank notes were deposited by the owner, transferred and delivered to a third person in payment of his own debt, without authority; *Held* that in an action against the latter, by the owner, to recover the value of the notes, it was erroneous for the judge to charge the jury that a person receiving money in good faith, *where there were no suspicious*

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circumstances attending the receipt, is not bound to inquire into the title of the party for whom he received it, although it might have been stolen, or acquired in a dishonest way.

APPEAL from an order made at a special term denying a motion to set aside the verdict as against evidence, &c. The complaint alleged that about October 23, 1857, the plaintiff left with Jacob Cohn nine hundred pounds sterling, to be deposited by Cohn with the defendants, for the plaintiff. That Cohn did deposit the same with the defendants for safe keeping, to be paid to the plaintiff on demand. That the plaintiff has demanded the same from defendants, who refused to deliver it. The plaintiff demanded judgment for \$4356, with interest from February 3, 1858. The answer specifically denied each and every allegation in the complaint. The facts were these: In October, 1857, one Jacob Cohn owed the firm of John G. & J. Boker, on an account for Hungarian wines sold him, about \$5000. He had been dealing with that firm for some time, and had been doing a prosperous business. He had sold the wines bought by him of John G. & J. Boker. He had been in the habit of paying them sums of fifty, one hundred, and two hundred dollars, and had paid them sovereigns, but had not paid them any sums for some months prior to October, 1857. During the spring and summer preceding October, 1857, Cohn had been pressed by the firm of John G. & J. Boker for money, and to pay a larger sum than he had before paid, and he had promised to pay them a large sum on account of his indebtedness. On October 22, 1857, Cohn came to the counting house of John G. & J. Boker—John Boker, Louis Funke, jun. and Charles Grimmer being then there—and exhibiting two Bank of England notes, one for £500 and one for £200, offered them to Funke, one of the firm, saying, here is money for you. Funke told Cohn to get the notes changed, as he owed them dollars not pounds, but Cohn insisted Funke should do that for him; Funke agreed, and told him he should be credited the amount of the notes. Cohn then expressed a wish for a

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loan of one or two hundred dollars in a few days. Funke agreed that he should have it. As Cohn was leaving, Boker said to him, jocularly, "Cohn, where did you steal that money?" Cohn replied, "don't speak that way, it is my money." The notes were given to a broker the next day to be exchanged. He sold them and brought to John G. & J. Boker the amount, \$3212.22, which was immediately applied to the payment and extinguishment of Cohn's indebtedness to that amount, and entered to his credit in the books of the firm. Within a week or two, at Cohn's request, the amount was entered to his credit on his pass book, by the book-keeper of John G. & J. Boker. In consideration of this payment, and immediatly thereafter, the firm of John G. & J. Boker sold to Cohn more goods on credit, to the amount of eight or nine hundred dollars, and loaned him the sum of two hundred dollars agreed to be loaned at the time of said payment. No part of either of these sums was ever paid, and Cohn owed the firm on January 1, 1858, a balance of \$2764.05, which is still due. At the time of the payment by Cohn, nothing was said or intimated about the plaintiff, or any other person, having or claiming any title or interest in the bank notes. Neither Boker nor Funke had any knowledge, information or suspicion, that any other person than Cohn owned or claimed the notes or was interested in them. About the 10th or 11th of October, 1857, the plaintiff, then being in prison in this city, gave to one Abraham Lyons three Bank of England notes, one for £500 and two for £200 each. Lyon held them, and out of them made disbursements for and by direction of the plaintiff, until he delivered two of them to Cohn. About October 22, 1857, the plaintiff said to Lyon, in the presence of Cohn, "Give Cohn that money." Shortly after Lyon gave to Cohn one £500 note, and one £200 note. No receipt or other writing was made. The plaintiff had before this occurrence boarded at Cohn's house, and had become indebted to him for wines, provisions, &c, services rendered and money loaned. His indebtedness to

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Cohn for these and similar considerations, continued and increased after the notes were delivered to Cohn. On December 2, 1857, plaintiff wrote a receipt, took it to Cohn to sign; Cohn signed it, and added the words, "To be returned February 2, 1858." The receipt was as follows: "Certificate of deposit of £700, say seven hundred pounds of sterling in two notes on the Bank of England, which I have received as deposit from Mr. Abraham Lyons by order and on account of Mr. Israel Steinhardt, and I promise to return said deposit in natura (—i. e. in an article of the same generic nature—) to its owner Mr. Israel Steinhardt, or his order, without any objection. JACOB KOHN." To be delivered February 2d, 1858. On December 10, 1857, plaintiff and Cohn came to the cellar 83 Water street, and deposited the receipt with one F. X. Hazman for safe keeping. Hazman put it in a box at his house, where it remained until he took it from there on the second February, 1858, and delivered it to the plaintiff. Neither of the defendants or Funke ever saw or heard of this receipt until after the commencement of this suit. A few days before February 2, 1858, the plaintiff came to the cellar 83 Water street, and inquired of Hazman whether Cohn was responsible for the money he owed the plaintiff. The plaintiff came to the counting house of the defendants' firm, in February, 1858, with another person, who inquired if Cohn had left three notes there. He was informed what had occurred. No demand for them was made. Some time prior to February 13, 1858, the plaintiff commenced an action against Cohn for the recovery of the nine hundred pounds and a gold watch, alleging that he deposited them with Cohn for safe keeping, and that the latter converted them. Cohn was arrested in that suit. By the pleadings in that suit, duly verified, the plaintiff denied that he had given the bank notes to Cohn to be deposited with these defendants. That suit has been dismissed or suspended. The plaintiff, at the time of the commencement of this action,

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was indebted to Cohn in a large sum for board, wines, segars, money loaned, services rendered, &c.

The action was tried at the New York circuit in November, 1859, before Justice STRONG and a jury.

At the close of the testimony the defendants' counsel moved to dismiss the complaint as against both these defendants. 1. Because no contract whatever between the plaintiff and defendants was proven. 2. Because the proof showed that Cohn occupied the position of a simple debtor to the plaintiff, for the amount or value of the bank notes in question, and was invested with no special trust in regard thereto. 3. Because in no view of the testimony were the defendants liable to the plaintiff, for any amount.

His honor the justice denied the motion; and the defendants' counsel excepted. The defendants' counsel then moved to dismiss the complaint as against the defendant John G. Boker, or that said defendant be discharged from the suit, for that no cause of action whatever against him was proven.

His honor the justice denied the motion, and the defendants' counsel excepted.

The justice, among other things, charged the jury that if the defendants, when these notes were delivered to them, were not informed by Cohn of the plaintiff's rights; if Cohn delivered them, as the defendants testified, to be sold and the proceeds credited in his account; if the jury were satisfied, from the evidence, that the notes were delivered to the defendants under such circumstances as would induce a suspicion in a man of ordinary prudence, or a business man, in respect to the right of Cohn to the notes, and to deal with them in that manner, it was the duty of the defendants to make inquiry with respect to the plaintiff's title to them; and if they omitted to make such inquiry, which, if they had made, would have led to a discovery of the truth of the case, (of the plaintiff's right,) and they took these notes and disposed of them in that manner, they are chargeable by the law for the notes as if the actual notice were given to them;

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and the sale of them was in violation of the plaintiff's rights, and entitled the plaintiff to call upon them for their full value. That it was claimed on the part of the plaintiff, that there were such circumstances, and it would be for the jury to look into the evidence carefully with respect to the dealings between Cohn and the plaintiff, and before adopting the conclusion that there were suspicious circumstances attending the receipt of these notes by the defendants, the jury should be entirely satisfied by the evidence that such circumstances existed. But if they were thus satisfied that here were such circumstances as would excite suspicion in men of common prudence, then it was the duty of the defendants to make inquiry, and if they omitted to do so when they could have ascertained the truth, they were chargeable with knowledge, and the case was the same, with respect to the plaintiff's rights, as if such knowledge had been communicated in express terms. To this portion of the charge the defendants' counsel excepted. The judge further charged that another question in the case related to the right of the defendants to sell these notes and apply the proceeds on Cohn's account, upon the assumption that the plaintiff was the owner at the time these notes were received by the defendants. That whichever of these men, the plaintiff or Cohn, was the owner of these notes at the time they were delivered to the defendants—if they were delivered to the defendants to be exchanged, and the proceeds to be credited to Cohn, and the defendants received these notes in good faith, and in ignorance of the rights of any other person, and as a payment upon Cohn's account, and they sold the notes and made this credit—then the sale by the defendants was legal, and this payment upon the account was a valid payment, and the rights of the plaintiff to the notes, if he held them, were lost. That this was upon the principle, in case of money, and bank bills, and negotiable paper of any kind, that it is the policy of the law that it should have an unrestricted circulation. That persons receiving paper of that character should be able to do so with

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safety, and without the liability to have their rights questioned at any subsequent time. That is, a person receiving money in good faith, when there are no suspicious circumstances attending the receipt, is not bound to inquire into the title of the party from whom he received it, although it may be stolen, or may be acquired in a dishonest way. The defendants' counsel excepted to this part of said charge, to wit: "Where there are no suspicious circumstances attending the receipt." The defendants' counsel requested his honor the justice to charge the jury as follows: 1. If the jury believed that Cohn paid to the defendants the proceeds of the bank notes, in part payment of his debt to them, and the same were so received by the defendants, and credit given to Cohn therefor, and at that time the defendants had not actual notice of any right or title of the plaintiff or other person in or to such money, the plaintiff cannot recover. 2. That if the jury believed that Cohn paid to the defendants, and they accepted from him the bank notes themselves in payment of a part of his debt to them, without any such notice of any claim, title or right of the plaintiff, or other person in or to them, the plaintiff cannot recover. 3. That it is a legal conclusion from the testimony on that subject, that the relation of Cohn to the plaintiffs, so far as respects these bank notes, was that of a simple debtor. His honor the justice declined so to charge, otherwise than as he had before charged on that subject; and to such refusal the defendants' counsel excepted.

The jury returned a verdict for the plaintiff for \$3678.17, and the court made an allowance of \$100 to the plaintiff.

N. B. Hoxie, for the appellant.

Beebe, Dean & Donohue, for the respondents.

By the Court, INGRAHAM, J. The question in this case is whether a party who takes a note in the usual course of bu-

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business, and gives value for it, is bound also to make inquiry as to the title to the note, if there are circumstances of suspicion attending the receipt of it, or if the person taking it is guilty of negligence by which he is led to take it, when due diligence would have informed him of the defect of title.

In *Raphael v. The Bank of England*, (33 *Eng. Law and Eq.* 276,) it was held that the title of a person to a note received in good faith and for value could not be impeached for negligence. In that case notice of the note having been stolen had been left at the plaintiff's office, but had not been seen by him. (*Goodman v. Harvey*, 4 *Ad. & El.* 870.)

Mr. Justice Allen, in *Hall v. Wilson*, (16 *Barb.* 550,) says, quoting from Lord Denman, "Gross negligence may be evidence of *mala fides*, but is not the same thing." And he adds, "where the bill has passed to the plaintiff without and proof of bad faith in him, there is no objection to his title. In the absence of bad faith in the holder, if he is in other respects within the rule established for the benefit of commercial paper, his title will be upheld."

In *Davis and others v. McCready and others*, (17 *N. Y. Rep.* 230,) the note was taken with knowledge of the purpose for which it was made, but without knowledge of a failure of that consideration. DENIO, J. held that though the plaintiffs had such notice, they were not required to see whether the payees had performed their agreement; and he adds, "a party receiving a bill is not put upon inquiry, unless circumstances of suspicion have come to his knowledge."

The old established rule of law that the holder of bills, &c. can give a title which he does not possess, to a person taking them *bona fide* for value, is not to be qualified by treating it as essential that the person should take them with due care and caution; but the person taking them *bona fide* for value has a good title, though he takes them without care or caution; except so far as the want of such care and caution may affect the *bona fides* and honesty of the transaction. (*Porter v. Pearson*, 1 *C., M. & R.* 849. 5 *Tyrw.* 870. *Goodman*

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v. *Harvey*, 6 N. & M. 372. 4 Ad. & El. 870. *Goodman v. Simonds*, 20 How. U. S. Rep. 363.) The judge erred in his charge on this point.

Judgment reversed and new trial ordered; costs to abide the event.

[NEW YORK GENERAL TERM, May 6, 1861. *Clerke, Gould and Ingraham*, Justices.]

 ECCLESTON vs. OGDEN.

The receipt of additional security is a good consideration for an agreement, by the holder of a promissory note, to relinquish all claim upon it, against an indorser.

A promise to settle and secure the payment of other notes indorsed by the promisee, on which he had been sued by the promisor, and to pay certain expenses on them, followed by the giving of such security, is also a sufficient consideration for such an agreement.

An agreement of that nature, made by the holder of a promissory note, after it becomes due, is sufficient to estop him from suing on the note, in his own name.

THE action was against the defendant as the second indorser of a promissory note. The cause was tried before the Hon. W. F. ALLEN, without a jury. The answer stated that the note was an accommodation note lent by the makers, J. & J. Lincks, to one Newell to raise money upon, and that the defendant indorsed it at the request and for the accommodation of Newell and Anable, and that it was then discounted by Anable, for Newell, at usurious interest; that the note, when it fell due, was held by Anable; and that after the note became due, and while held by Anable, before it was transferred to the plaintiff, Anable agreed with Ogden, the defendant, that if he (Ogden) would settle and secure the payment of certain other notes, on which Ogden's name was, and on which he was then sued by Anable and which were controverted, and would pay certain expenses, he (An-

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able) would make no claim, and would relinquish all claim on this note in suit and on certain other notes. That Ogden agreed to this, paid the expenses and secured those notes. This was proved. And the judge found that Anable did so agree to release Ogden from his indorsement of this note, and that Ogden gave him the security for the other notes as he agreed. But the judge held, as matter of law, that there was no legal and sufficient consideration for such agreement; that is, that giving security to pay one liability and the costs of suit, and the expense of preparing the security, was not a sufficient consideration for the release of another liability. And as a consequence of this decision, he held that Anable's right to recover on the note was not impeached, and therefore he could pass it to the present plaintiff, after due as well as before, and without consideration, as well as with; and that it was therefore immaterial whether the plaintiff took it from Anable, after it was due, or on what consideration he received it. The defendant had given evidence to prove, and claimed that he had proved, that Anable held the note when it fell due. The cashier of the Atlantic Bank testified that Anable deposited it for collection, and he had no knowledge of its having left the bank until it was sent to the American Exchange Bank for collection; and after it was protested, it was credited to Mr. Anable. The notary of the bank testified that Anable paid him, for the Atlantic Bank, the amount of the note, the day after it was protested, that such was Anable's habit as to paper indorsed by him, and he then gave the note to Anable. This evidence was disregarded and held to be of no importance by the judge, inasmuch as he also held, as matter of law, that Ogden's agreement with Anable was without consideration and void, and did not impeach Anable's title to recover on the note. The defendant excepted to this decision, and appealed from the judgment.

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G. C. Goddard, for the appellant.

E. S. Van Winkle, for the respondent.

By the Court, INGRAHAM, J. The judge on the trial found that the note was not usurious. That the indorsement of the defendant was valid, and not for the accommodation of Anable. That Anable agreed to release Ogden from the payment of this note, on condition of his giving security to pay other notes and costs of suit, which security was given by Ogden. That such agreement was not founded on any sufficient consideration. That he does not pass upon the consideration on which, or the time when, the note was passed to the plaintiff.

With these findings, the only question is whether the agreement with Anable was binding or not.

The receipt of additional security is a good consideration for such an agreement. Besides, the agreement to pay the costs of a suit not decided, is also a sufficient consideration.

Although the defendant had no release, yet the agreement, as made by Anable, was sufficient to estop him from prosecuting on the note in his own name. It therefore became necessary for the court below to pass upon the question, whether the plaintiff was or was not the real owner of the note. If he was not, the plaintiff could not recover.

Judgment reversed; new trial ordered; costs to abide the event.

[NEW YORK GENERAL TERM, May 6, 1861. *Clerke, Sutherland and Ingraham*, Justices.]

SCHUBART *vs.* HARTEAU.

34	447
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A counter-claim, under the code, may be either for liquidated or unliquidated damages, if they arise upon contract.

Where a claim is prosecuted by a plaintiff against a defendant who has a claim against the plaintiff and others, on contract, the defendant may set up the same as a counter-claim, and recover any balance against the plaintiff over the plaintiff's claim, unless the plaintiff replies to the counter-claim that there are other persons liable with him as partners.

In such a case the counter-claim is good, so far as to be a set-off against the plaintiff's claim to that amount.

THIS action is on a promissory note made by George G. Johnson, and indorsed by R. F. Blydenburgh and the defendant, and was brought by the plaintiff as indorsee, against the defendant, as indorser. The note in suit was made by Johnson, payable to the order of Blydenburgh, indorsed by Blydenburgh, then by the defendant, then by Hoffman, Schubart & Kahn to the plaintiff. On the day the note became due, it was duly presented to the maker and payment refused, and due notice to hold the indorsers was given to Blydenburgh and the defendant. At the time the note became due and was protested for non-payment, it was held by Hoffman, Schubart & Kahn, who subsequently, and after it became due and was protested, and before suit brought, indorsed it to the plaintiff. The answer alleged two matters of defense. *First.* That in June, 1855, the firm of Hoffman, Schubart & Kahn, of which the plaintiff was a member, induced the defendant to purchase stone from them, taken from a quarry belonging to them, to be put in a house then being erected by the defendant, and agreed with the defendant to indemnify him from any loss he might sustain by making such purchase at the price he agreed to pay for it; that the purchase of said stone resulted in a loss to the defendant of \$400, and that the note in suit was indorsed and paid by the defendant to said firm on a settlement of accounts for such stone. *Second.* That in October and November, 1856, said Hoffman, Schubart & Kahn sold the

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defendant a large quantity of stone, and agreed with the defendant that it was sound, good and merchantable; that on a settlement of accounts for such stone, the note in suit was indorsed and paid by the defendant to said firm; that said stone, at the time of the sale, had a defect known to the vendors, but unknown to and not discoverable by the defendant; that said defect was discovered the following spring; that the defendant had suffered damages to \$350 by reason of a breach of the agreement on the part of the vendors.

The action was tried, at the New York circuit, before Justice BONNEY and a jury, in March, 1860.

The counsel for the defendant admitted the making of the note set forth in the complaint, then presented by the plaintiff's counsel, and that said note was duly indorsed by R. F. Blydenburgh, the payee, and the defendant, and after him by Hoffman, Schubart & Kahn; and that on the day the said note became due and payable, the same was presented to the maker thereof and payment was demanded of him, which was refused, and thereupon said note was duly protested for non-payment, and that due and timely notice of such presentment, demand, refusal and protest were given to R. F. Blydenburgh and the defendant, the said indorsers. The plaintiff's counsel then read the said note in evidence, and rested. The plaintiff's counsel admitted that Hoffman, Schubart & Kahn were the holders and owners of said note at its maturity, and transferred it to the plaintiff after it became due. The counsel for the defendant being about to produce testimony, and offering to prove the contract for indemnity between Hoffman, Schubart & Kahn and the defendant, first set up in his answer, and the breach thereof by the said Hoffman, Schubart & Kahn, and the defendant's damages resulting from such breach; and that the said note in suit was indorsed and paid by the defendant to the said Hoffman, Schubart & Kahn on a settlement of accounts for stone sold under and pursuant to said contract. The counsel for the plaintiff objected to such evidence, and the whole of it, as

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irrelevant and immaterial, which objection was sustained by the court; to which ruling and decision of the court the counsel for the defendant excepted. The counsel for the defendant then offered to prove the matters secondly set up as a defense in the answer, to wit, the sale and delivery in the fall of 1856, by Hoffman, Schubart & Kahn to the defendant, of a quantity of brown stone for building purposes, which they undertook and promised were sound and good merchantable stone of the value of \$1200, and that said stone were not sound, but had a latent defect which could not be discovered at the time of the sale, and were not merchantable or suitable for building; and that in consequence of such defect the defendant sustained damage, and the amount of such damage; and that the note in suit was indorsed and paid by the defendant to the said Hoffman, Schubart & Kahn in settlement for said stone. To which evidence, and the whole of it, the counsel for the plaintiff objected as irrelevant and immaterial, which objection was sustained by the court; to which ruling and decision of the court the counsel for the defendant excepted. The defendant here rested. The court thereupon charged the jury, and they found a verdict for the plaintiff for the sum of six hundred and forty-four dollars and forty-one cents.

The defendant appealed from the judgment.

Nye, McCoun & Angel, for the appellant.

A. H. Wallis, for the respondent.

By the Court, INGRAHAM, J. A counter-claim, under the code, may be either for liquidated or unliquidated damages, if they arise upon contract.

Where a claim is prosecuted by a plaintiff against a defendant who has a claim against the plaintiff and others, on contract, the defendant may set up the same as a counter-claim, and recover any balance against the plaintiff, over the

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plaintiff's claim; unless the plaintiff replies to the counter-claim that there are other persons liable with him, as partners. (*Briggs v. Briggs*, 20 Barb. 477.) In such a case the counter-claim is good, so far as to be a set-off against the plaintiff's claim to that amount.

It would seem, further, that the case does not differ from one where the party in a suit on his own note, given in payment for property delivered under a contract, makes defense that the property was not according to the contract. And in such a case the ground of defense taken by this defendant must be admissible, and if proved, available.

Judgment reversed, and a new trial ordered; costs to abide the event.

[NEW YORK GENERAL TERM, May 6, 1861. *Clerke, Gould and Ingraham*, Justices.]

GREEN, executor, &c. vs. McARTHUR and others.

Where a composition deed contains a condition that if any one of the composition notes is not paid, at maturity, the original indebtedness shall revive a mere notice from the makers, that the notes will not be paid, will not excuse the holders from demanding payment, at the place where the notes are made payable.

If the makers of the notes place the money in the bank, to pay them, the failure to pay does not occur, and the original debt is not revived; notwithstanding such notice.

THE plaintiff sued as indorsee of a note, made by the defendants, and delivered by them to David Douglass & Co. A composition deed was executed between the defendants and their creditors (including Douglass & Co.) containing a condition that, if any one of the composition notes was not paid at maturity, the original indebtedness should revive. Before the first composition note given to Douglass & Co. matured, the defendants gave them notice that the composition notes would not be paid; whereupon Douglass & Co

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tendered back the composition notes, and sold the original note (through their broker) to the plaintiff. The court held that the defendants put an end to the composition, by giving notice that it could not be performed on their part; and that the original note was thereupon revived. Judgment in favor of the plaintiff, at special term, from which the defendants appealed.

Rich'd O'Gorman, for the appellants.

J. M. Van Cott, for the respondent.

By the Court, INGRAHAM, J. The plaintiff held the rights of Douglass & Co. at the commencement of the suit. Those rights were to have the claim on the original note revive in default of payment of the notes given on the compromise. The notice from the defendants that the compromise notes would not be paid, was not sufficient to relieve Douglass & Co. from the duty of demanding payment of the notes at the Tradesman's Bank, where they were made payable.

The compromise was originally binding, on the ground that the other creditors were parties to the contract. They had not assented to this notice. Their rights could only be affected by a presentment of the notes for payment.

We think it makes no difference whether the other creditors were paid under the first deed or not. The money was provided for the payment of the plaintiff's notes, and they should have been presented, notwithstanding the notice.

As the defendants placed the money in the bank to pay the notes given on the compromise, the failure to pay has not taken place, and the original debt was not revived.

Judgment reversed and new trial ordered; costs to abide the event.

[NEW YORK GENERAL TERM, May 6, 1861. *Clerke, Ingraham and Gould*, Justices.]

RANDALL and others *vs.* SMITH.

The statute of 1857, relative to the protest of notes, only alters the law as to service of notice of protest, where the indorser resides or has a place of business in a city or town, or where he is reputed to reside or have a place of business therein, on diligent inquiry. In such cases the service may be by notice through the post office.

Where there is no evidence of any diligence to find the residence of the indorser, or even of any inquiries on the subject being made, the act of 1857 does not apply.

Where the parties to a note made and dated at the city of New York were informed that the indorser resided on Long Island; *held* that this was sufficient to put them on inquiry, and to satisfy them that he did not reside in New York.

THIS action was brought by the plaintiffs as indorseees, to recover from the defendant as first indorser, the sum of \$510.39, being the balance due on a promissory note, of which the following is a copy :

“\$708.69.

NEW YORK, *July* 20, 1859.

Sixty days after date, I promise to pay to the order of Nathaniel W. Smith, seven hundred and eight dollars and sixty-nine cents, value received.

(Signed,) E. H. BACHE.

(Indorsed,) Nath. W. Smith.”

The defendant resided at Flushing, Queens county, L. I., during the running of the note, and for four years next before the note was made, and had resided on Long Island for twenty years, and for twenty years had no place of business in New York. Both the other parties to the note knew where he resided. And the plaintiffs were informed at the time they took the note that Smith resided on Long Island. It does not appear that it was written or indorsed on the note where the defendant, Smith, resided. Smith made the usual affidavit required by the statute, denying that he ever received any notice of presentment or non-payment of the note.

The notary testified, that he inclosed notice of protest to the defendant, Smith, at “New York city,” that being, “according to the best information, upon diligent inquiry, the

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reputed place of residence of said indorser, and the post office nearest thereto."

The action was tried at the New York circuit, in April, 1860, before Justice EMOTT, without a jury. At the close of the testimony, his honor the judge decided that it was not proved that due notice of the presentment of the note to the maker, and of his refusal to pay the same, had been given to the defendant, and that as to him the complaint must be dismissed. To which ruling and decision the counsel for the plaintiffs excepted. His honor the judge directed and decided that judgment, dismissing the complaint as to the defendant, with costs, should be entered. To which direction and decision the counsel for the plaintiffs duly excepted. Judgment was entered in accordance with such decision and direction, and the plaintiffs appealed.

A. H. Wallis, for the appellant.

E. Terry, for the respondent.

By the Court, INGRAHAM, J. The plaintiffs were informed that the defendant resided on Long Island. This was sufficient to put them on inquiry, as to residence, and to satisfy them that the defendant did not reside in New York.

The statute of 1857, relative to protest of notes, only alters the law as to service of notices of protest, where the indorser resides or has a place of business in a city or town, or where he is reputed to reside or have a place of business therein, on diligent inquiry. In such cases the service may be by notice in the post office.

There is no evidence of any diligence to find the residence of the indorser, or even of any inquiries on the subject. The act of 1857 does not apply to this case.

Judgment affirmed, with costs.

[NEW YORK GENERAL TERM, May 6, 1861. *Clerke, Gould and Ingraham*, Justices.]

GERARD and others vs. PROUTY.

So long as any thing remains to be done, to complete a contract of sale, a partial damage to the property, as well as a total damage, is at the risk of the vendor.

Thus, where a quantity of cigars were sold at auction, for cash, those loose, in cases, to be weighed, and those in boxes to be counted as full boxes, it was *held* that the vendors must bear the loss occasioned by a rain, occurring before the cigars were weighed or counted.

And when, in an action by the vendor, for the price of the goods, the defendant seeks to recoup for damage done to the property after the sale and before delivery, it is for him to show that the damage occurred between the sale and delivery.

And he must prove the actual damage, without reference to the price paid at auction. It is erroneous to allow him the difference in value between the auction price and the value of the property when delivered.

THE plaintiffs are auctioneers, and as such, on the 5th day of August, 1859, at the store of Andre & Brother, No. 107 Water street, New York, they held a public sale of cigars belonging to Andre & Brother, which had been somewhat injured by being wetted. The building had been partially destroyed by fire, and was unrepaired at the time of the sale. The terms of the sale were these: "That they were *damaged cigars*, to be sold for cash. Loose cigars to be sold in cases, 15 pounds to the thousand cigars, to be weighed by a weighmaster immediately after the sale. Those in boxes were to be sold with no allowance for deficiency in quantity or deficits, that is, those boxes with any cigars in were to be counted as full. Cigars to be delivered in order of sale, by the porter; any deficiency was to come off the last lot sold; or if more, to be added on to the last parcel." The plaintiffs stated, "we did not know how many cigars there were in this lot, but was supposed to be 400,000, more or less;" also, "*that the cigars were damaged by fire and water*, and those in cases would be weighed, including the dirt and cinders, in the condition they were then in." The defendant bid at the sale upon several parcels, which were struck off to him at the prices stated in the complaint. A

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slight rain was falling when the sale commenced ; within a few minutes after the sale was concluded the rain became violent, and falling upon the partially destroyed roof and floors, was conducted in a large stream directly upon the cigars in the cases and boxes bidden upon by the defendant. The defendant immediately gave notice to the plaintiffs and Andre & Brother, and demanded that the cigars and boxes should be protected from further injury, or that they might be delivered to him for that purpose ; but nothing was done, and Andre declined to do any thing. The cigars in boxes were injured, and those in the cases were wholly destroyed. Soon after the sale, the plaintiffs delivered to the defendant an account of the cigars bought by him. They also gave him an order for the delivery of the cigars upon Andre & Brother, upon which the defendant paid the plaintiffs \$600 upon account ; and it was then agreed between them that the defendant should count and examine them, the cigars in boxes, and would pay the balance found to be due after doing so. The defendant then proceeded to the store of Andre & Brother, and presented the order and demanded the property, which was refused to be delivered. The defendant then obtained another order, and after this was done, and the cigars weighed and ready to be delivered, it was so late that only a portion of them could be delivered on that day. The remainder were not received until the next day. Upon being counted, a deficiency was found in the number of boxes, of 82,000 or thereabouts, and the cigars in the cases were found to be utterly worthless, and the cases themselves to be partly filled with cinders, ashes, &c., upon which cigars had been placed, so as to hide such contents from view.

This suit was brought to recover the alleged balance due from the defendant. He claimed a deduction for the deficiency in the *number* of "cigars in boxes," and to *recoup* for damages done to the property *after the sale and before delivery*. The referee arrived at these conclusions of law : That until the cigars were counted and weighed, the title

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thereto did not pass to the defendant. That the plaintiffs were responsible for the damage which occurred to the cigars by reason of their becoming wet, while in their possession, and until they were counted and weighed. That under the above facts, a return of the cigars, or an offer to return, was not necessary. And that the defendant should only be charged with the actual value of the cigars delivered to him, after being dried as aforesaid, and he should be credited the amount paid, and for the difference, viz. the sum of \$229, and was entitled to recover judgment against the plaintiffs, with interest from the 6th day of August, 1859, besides costs. From the judgment entered upon the report, the plaintiffs appealed.

Jas. W. Gerard, for the appellants.

John N. Whiting, for the respondent.

By the Court, INGRAHAM, J. The plaintiffs acted and sued in their own names as principals. The defendant's remedy was against them, without reference to whether they were agents or not.

The counter-claim is for damages to the property sold by the plaintiffs, after the sale and before the delivery. At the time of damage, the cigars had not been weighed or counted. Both of these acts were necessary before title passed, in addition to delivery. If at this time the cigars had been destroyed by fire, the loss would have fallen on the vendors.

A partial damage, as well as a total damage, is at the risk of vendors, until all that is necessary to complete the contract has been performed. Until they were so counted and weighed, the plaintiffs must bear the damages sustained before that time.

But the referee erred in his rule of damages. It was for the defendant to show that the damage was done between the sale and delivery. If he was not able to show that, he

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failed in proof, and the referee should not have decided in his favor.

He also erred in giving the difference in value between the auction price and the value when delivered. He had no right to assume that the whole difference was occasioned by the rain. The defendant must prove the actual damage, without reference to the actual price paid at auction.

It may well be that under the mode in which these cigars were sold, the defendant paid more for them than the witnesses who valued them after the rain estimated them to be worth, but still he was not entitled to such deduction.

Judgment reversed; case referred back to referee, with directions to open the case, allow either party to produce further evidence, and report thereon; costs to abide the event.

[NEW YORK GENERAL TERM, May 6, 1861. *Clerke, Gould and Ingraham, Justices.*]

MORRIS S. VANBUSKIRK and others vs. JOSEPH M. WARREN
and others.

THE SAME vs. HANNIBAL GREEN.

B., being indebted to the plaintiffs, he, for the purpose of paying and securing the amount of their claims, on the 3d day of November, 1857, at the city of Troy, in the state of New York, by a valid instrument in writing executed under his hand and seal, sold and assigned to the plaintiffs 41 iron safes then being in Chicago, in the state of Illinois. The plaintiffs proceeded, without delay, to take possession of the safes; but before they were able to do so, or to make any demand of the same, the defendants, on the 5th of November, 1857, levied upon the safes, at Chicago, as the property of B., by attachments sued out of the court of common pleas of Cook county, Illinois, by them. The property was subsequently sold under executions issued upon judgments perfected in the attachment suits, and never came into the possession of the plaintiffs. One of the plaintiffs resided in the state of Ohio, but all the other parties, plaintiff and defendant, together with B., resided and did business in the state of New York, where the plain-

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tiffs' debts as well as those upon which the attachments issued, were contracted.

- Held*, 1. That the rights of the parties were to be determined by the laws of New York, and not by those of Illinois.
2. That the title to the property having been changed, by a valid sale and transfer thereof from B. to the plaintiffs, before the levy of the defendants' attachments thereon, the plaintiffs had the prior right.
3. That the plaintiffs not being either parties or privies to the proceedings and judgments in the attachment suits, in Illinois, were not bound by them, nor estopped from contesting, in the courts of New York, the title to the property.
4. That if the assignment was valid, and passed the title to the safes, as against B., it was equally valid as against the defendants, who were only creditors at large, and not in a position to attack the assignment as fraudulent. That the act of attaching, as creditors at large, the assigned property, did not put the defendants upon the footing of *bona fide* purchasers for value without notice, so as to enable them to call in question the validity of the act of B. in disposing of the property. GOULD, J. dissented.

The law of the owner's domicil determines the validity of every transfer, alienation or disposition made of personal property by the owner; and the nature and construction of personal contracts is to be controlled by the *lex loci contractus*. *Per* WRIGHT, J.

This is the general rule, *ex comitatu*; but a particular state may, by its statute or customary law, make special provisions in respect to personal property actually within its territory, in favor of its own citizens, as it has entire dominion over it while therein, in point of sovereignty or jurisdiction. *Per* WRIGHT, J.

A voluntary transfer of personal property, which is valid by the law of the owner's domicil, is valid every where, unless the law of the particular sovereignty in which it is situated has abrogated, or is in contravention, in special cases, of the general rule of the public law. *Per* WRIGHT, J.

THESE were respectively actions in the nature of the former actions of trespass or trover, to recover from the defendants the value of 41 iron safes, alleged to belong to the plaintiffs, and to have been wrongfully taken and carried away by the defendants. The safes were levied on by attachments sued out by the defendants, respectively, against John W. Bates. The property was subsequently sold under executions issued upon judgments perfected on the attachments in the court of common pleas of Cook county, Illinois. The plaintiffs were creditors of John W. Bates, in various

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amounts, to whom, for the purpose of paying and securing them the amount of their respective claims and protecting them from loss, he had, at the city of Troy, on the 3d day of November, 1857, sold and assigned the safes in question, they then being in Chicago in the state of Illinois; together with other safes at other places in the western states, and certain moneys, accounts and evidences of debt due upon sales of other safes at the west. Such sale and assignment were made by an instrument under his hand and seal, dated on the 2d day of November, 1857, and executed, acknowledged and delivered on the 3d day of November, 1857. The plaintiffs proceeded without delay to take possession, under said instrument, of the property included therein, but were prevented from taking possession of said attached safes by said attachments having been levied thereon previously to any demand made by the plaintiffs, at Chicago or elsewhere, of said safes. Such attachments were levied on the 5th day of November, 1857, at Chicago. The attached property was taken into the possession of the defendants, and never came into the possession of the plaintiffs. Judgments were perfected in the attachment suits, by the defendant, on the 9th day of June, 1858; in the first case for the sum of \$1826.77, and in the second case for the sum of \$1168.30. Woodbury, one of the plaintiffs, resided in the state of Ohio, but all the other parties, plaintiff and defendant, and also said Bates, resided and did business in the state of New York. The debts also originated there. The causes were tried at the Rensselaer circuit in February, 1859, before the presiding justice, without a jury. Evidence was given of the value of the safes, and it was agreed that if the plaintiffs recovered, the amount of the entire recovery was to be apportioned ratably in the two cases, according to the amount of the several judgments obtained in the attachment suits by the respective defendants, against John W. Bates.

The following opinion was given by the justice before whom the action was tried, at the circuit:

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HOGEBROOM, J. "The plaintiffs sue in an action analogous to one of trespass or trover, to recover the value of 41 safes, formerly the property of John W. Bates, and *levied* upon by the defendants at Chicago, in the state of Illinois, on the 5th day of November, 1857, under attachments against Bates, issued in behalf of the defendants and valid by the laws of Illinois. Judgments were subsequently and on the 9th day of June, 1858, obtained against Bates by default, in the attachment suits, executions issued thereon, and upon them the safes which had been previously attached were *sold* at Chicago, and the proceeds went to the benefit of the defendants. This constituted the title and justification of the defendants. Upon demand made by the plaintiffs, the defendants refused to return the safes, or account for the proceeds.

On the 3d day of November, 1857, Bates, then and therefore being the owner of the safes, and being indebted to the plaintiffs, severally, in various amounts which are specifically stated, in consideration thereof and for the purpose of securing the payment of such indebtedness and protecting them against any loss, sold, assigned and set over to them by an instrument under his hand and seal, dated the 2d and acknowledged the 3d day of November, 1857, all and every of said safes, and also with some exceptions all sums of money due or to become due, and accounts, securities and evidences of debt arising from the sales of other safes, and authorized them to take possession and control of said safes, (thereby sold to them,) and to sell the same at the usual prices at which such safes had been sold by Bates, or at such reasonable prices as said Bates or Pickett (one of the plaintiffs) should in writing approve, and to collect the moneys, accounts and evidences of debt transferred, and after deducting the reasonable costs and expenses of sales and collections, to apply from time to time the residue of the proceeds derived therefrom in payment of said debts, *pro rata*, until, if such

residue should suffice therefor, the said debts should be fully paid.

At the time of this last mentioned sale or assignment, said safes were in Chicago, in the state of Illinois, in a store occupied by a salesman or agent of Bates. The plaintiffs never had actual possession of the safes, but were proceeding without delay to take possession thereof under said instrument, and were prevented from taking possession by said attachments having been levied thereon previously to any demand made by the plaintiffs, at Chicago or elsewhere, of said safes. At the time said attachments were levied, the defendants were without any knowledge, information or notice of the assignment in question, and the plaintiffs were equally ignorant of the attachments and attachment proceedings. Soon afterwards, and before any further proceedings in the attachment suits, the parties were mutually notified of each other's claims and proceedings and of their respective sources of title.

Bates, and all of the parties, plaintiff and defendant, before, during, and since November, 1857, were and still are residents and citizens of the state of New York; except the plaintiff Woodbury, who resided in Ohio. The defendants and most of the plaintiffs resided and did business in the city of Troy. Bates manufactured there the safes in question, and the defendants sold to him there the *iron* of which the safes were made, and which iron entered into and formed the consideration of the judgments in the attachment suits which were subsequently perfected in Illinois.

The question arising upon this state of facts is, which has the better title to these safes, the plaintiffs or the defendants, and if there be a conflict between the law of New York and that of Illinois, on this question, which is to prevail? The defendants allege that the transaction between Bates and the plaintiffs was not an actual sale of the safes, but an assignment fraudulent and void upon its face, as against other creditors of Bates, imperfect and never consummated, either as a sale or assignment, for want of actual or constructive de-

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livery of the property sold or assigned, and at all events subordinate to the claims of the defendants by the laws of Illinois; and therefore that they cannot be made liable as trespassers or wrongdoers for the taking and conversion, in Illinois, of property to which, by the laws of that state, they had a right superior to that of the plaintiffs. The plaintiffs, on the other hand, contend that they are prior in point of time, and therefore superior in point of right; that by the laws of New York the sale or assignment to them would take preference of the subsequent attachment of the defendants; that personal property has no locality, but follows the domicile of the owner; that the transaction must therefore be governed by the laws of New York, and the more especially as not only all the parties, (except one of the plaintiffs,) including Bates, resided and did business here; but that the assignment was made here; and this, also, is the forum selected for enforcing the rights of the parties, no other having been previously selected or occupied for settling the controverted rights of the parties litigating in these actions.

If the transaction is to be determined by the law of Illinois, the defendants must prevail. It is there held that in a case similar to this the defendants are to be regarded in the light of bona fide purchasers for a valuable consideration, without notice of the plaintiffs' rights, and having *first* acquired legal possession, are by that circumstance entitled to a preference over the plaintiffs. A case very similar to the present is reported in 5 *Gilman's (Illinois) Rep.* 282, (*Burnett v. Robertson.*) The action was replevin to recover certain stage horses and harness, by the plaintiffs as the assignees and vendees of O. Hinton & Co. against the defendant, who justified under attachments against the same parties. "O. Hinton & Co. were mail contractors, and the former owners of the property, and on the 10th day of February, 1847, at *St. Louis*, had conveyed them, with other property, upon different stage routes, in Illinois, Iowa and Wisconsin, to the plaintiffs, who were their creditors, and who, immediately

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after the execution of the bill of sale, proceeded as fast as possible to take possession of the property conveyed, but before they had taken possession of the property in question, which was upon the stage route between Peoria and Ottawa, in Illinois, it was seized, in the county of Marshall, by the defendant, on the 14th day of February, 1847, as an officer, under various writs of attachment sued out in the county of Marshall, against O. Hinton & Co." The question turned mainly on the point of delivery. The court held that there was no actual delivery, as against the defendant; and that the attaching creditor was to be regarded in the same light as a purchaser, who in the case of two sales of personal property, both equally valid, had first obtained possession and thereby acquired the better right; that the plaintiffs not having obtained actual possession, nor exercised any acts of ownership over the property before the levy of the attachment, nor having given notice to the party in actual possession, of their title, and obtained his consent to hold them for their benefit, had not perfected their possession, and must fail; that it would operate injuriously upon trade and be unjust to purchasers, if purchasing in good faith from a party in actual and rightful possession and having authority to sell, they could not be protected against a purchase prior in point of date, but unaccompanied with delivery of possession; and that in the case of two innocent parties, he ought to suffer who purchases property knowing it to be at a distance and incapable of being reduced to immediate possession.

But the law of Illinois is not the law which must govern the case. The domicil of the parties, the act of assignment, and the forum of controversy being in the state of New York, the law of the latter state must govern. It is always to be regretted that a different rule should prevail in different states or countries; but when this does in fact occur, there are controlling circumstances which regulate the action of judicial tribunals. The first is, that as a general proposition, personalty follows the person, and that voluntary sales or

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assignments of personal property, made by the owner at the place of his residence, are construed by the law of the state of the owner's domicil. (*Story's Conflict of Laws*, §§ 379, 380, 383, 384, 242, 406. 2 *Kent's Com.* 429, *lect.* 37. *Holmes v. Remsen*, 20 *John.* 229. *Johnson v. Hunt*, 23 *Wend.* 87. *Hoyt v. Thompson*, 1 *Seld.* 320. *Abraham v. Plestoro*, 3 *Wend.* 538.) There are some exceptions to this rule where the statute law, and perhaps the judicial decisions of a particular state, owing to peculiar circumstances, make special provisions in regard to personal property actually within its territory, in favor of its own citizens. (*Story's Conflict of Laws*, §§ 244, 383, 325, 549, 550, 414, 416.) But the present is not such a case. On the contrary, not only the subject of controversy was owned in the state of New York, and there conveyed or assigned, but the debts of all the parties originated there, the residence of all the parties is there, and the controversy is conducted there. A different question might arise if this litigation had first commenced, between the parties to this suit, in the state of Illinois. It is quite possible that a judgment perfected in such a suit between the same parties, conducted in Illinois, whether resulting in favor of the one party or the other, might be regarded as conclusive upon them in this state, upon the ground that full faith and credit must be given by each state to the judicial proceedings of its sister states. (*U. S. Const. art. 3, § 4.* *Story's Conf. of Laws*, § 609. *Shumway v. Stillman*, 6 *Wend.* 447. *Dobson v. Pearce*, 1 *Duer*, 142. *Baker v. Rand*, 13 *Barb.* 152.) But that question does not arise.

We must then look at the question as it stands in the state of New York. I feel no great difficulty in determining the objections raised to the instrument of sale or assignment, upon its face, in favor of the plaintiffs. I think it conveys, absolutely and immediately, to the plaintiffs, the legal title to the property. It purports so to do, and such was, I think, the intention of the parties. If it had been lost or destroyed after the execution and delivery of the instrument, the loss

would, I think, have fallen upon the plaintiffs. Certain acts, it is true, were to be done by the plaintiffs under the instrument, but not so much, I think, to perfect the title as to regulate the price. The sale or assignment was not in trust for other creditors, but directly to the plaintiffs, for their own benefit, and in satisfaction *pro tanto*, or altogether, of their claims. (*Leitch v. Hollister*, 4 Comst. 211.) They were to take possession, but this is consistent as well with an actual transfer of title as with the idea that it was a mode of perfecting title. They were to sell the safes at the usual prices; but, as before stated, this was a mode of regulating the price. If they omitted to do it, it did not vitiate the transfer, but would charge the plaintiffs with their value at the usual price. But the plaintiffs not wishing to be charged absolutely with such price as they might be unable to obtain, it was further provided that they might be sold at such reasonable prices as Bates or Pickett might, in writing, approve. This was but a mode of regulating the value. It conferred no such power on the assignor, over the property, as evinced a fraudulent purpose to reserve some interest therein for his own benefit or was calculated to defraud other creditors. No other creditors had any interest in this property, unless the whole scheme was a fraudulent contrivance to dispose of the property for the assignor's own benefit, or for less than its value; and neither of these is fairly inferable. Bates had no absolute veto upon the sales, but only in a particular contingency a very limited power over them, to prevent a sacrifice of the property. The plaintiffs had the absolute right to sell at the usual prices, or at such reasonable prices as one of their number (Pickett) should in writing approve, or as Bates himself should approve. And I think they had the absolute right not to sell at all, or to sell at such prices as they pleased, subject to the contingency that in case they did not conform to the injunctions of the instrument, in the mode of disposing of the property, they should be chargeable with the property at the usual prices. The whole seems to have been an

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arrangement, and not an unfair or an injudicious one, to prevent on the one hand a sacrifice of the property by the plaintiffs, and on the other to prevent them from being subjected to the payment of an exorbitant price therefor—the true value not being at the moment capable of absolute ascertainment. If, in the event, there turned out to be a surplus over and above the payment of the plaintiffs' debts, I do not see but that the plaintiffs would hold the same as trustees for Bates or his creditors, but I discover no difficulty in the latter reaching the same, or any attempt to tie it up or protect it against their just demands. (*Leitch v. Hollister*, 4 *Comstock*, 211.)

The difficulty which has presented itself to my mind, if any in fact there be, is as to the delivery of possession of the assigned property. Was such delivery indispensable, to consummate the change of title; or was it sufficient that the delivery should be accomplished within a reasonable time thereafter, provided the parties were acting in good faith? *Immediate* delivery, it is true, is the usual accompaniment and manifestation of an executed sale of personal property; and if it does not take place, is a circumstance from which to infer fraud. But it is not an indispensable element in any sale, and after all, can only be regarded as a matter of more or less suspicion, according to the nature of the case. Our statute only raises a *presumption* of fraud, in such a case, even where the goods and chattels are at the time of the sale in the possession or under the control of the vendor, and so capable of immediate delivery; which presumption becomes fixed and conclusive evidence of fraud, to be sure, as against creditors and purchasers in good faith, unless rebutted by evidence, that the sale or assignment was made in good faith and without any intent to defraud such creditors or purchasers. (2 *R. S.* 136.) If, then, there are circumstances, as in this case, showing a reason why immediate delivery could not be effected, to wit, that the goods were at the moment many hundred miles distant, (*Nash v. Ely*, 19 *Wend.* 523;) if

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the parties were proceeding, as is conceded in the case, with due diligence to consummate the transfer of possession; if there was in fact good faith; and the existence of the debts and the actual and *bona fide* character of the consideration tend to show that fact; if there was no intent to defraud creditors or purchasers, and the uncontradicted evidence tends to repel such intent; then the present appears to be a case in which, according to my understanding of the law, the plaintiffs must recover. The defendants must, I think, stand or fall by the circumstance of non-delivery of possession for two days; and as already stated, that at most is a circumstance of suspicion and not controlling evidence of fraud, and the suspicious circumstances, if any exist, are, I think, sufficiently explained. The contrary position is ably maintained in the case from 5 Gilman's Reports, already quoted, but I am not sure that the learned court who pronounced that opinion did not go too far, in the first place, in putting the attaching creditor upon the same footing as a *bona fide* purchaser for value, without notice, and, in the second place, in saying that a purchaser of the latter character would be, under the circumstances, protected. I am not sure, also, that they were not considerably influenced by the circumstance that in that state the omission to deliver possession makes the sale *absolutely* void; for such I understand to be the law of that state, (1 *Stat. of Illinois*, ed. of 1858, p. 562; *Thornton v. Davenport*, 1 *Scam. Ill. Rep.* 293; *Ketchell v. Brutton*, *Id.* 303; *Rhines v. Phelps*, 3 *Gil.* 455,) as it certainly is not of this. Be that as it may, it is, I think, sufficient to say that the case must be decided by the law of New York, and that, I think, turns the scale in favor of the plaintiffs.

On the subject of damages, the plaintiffs, if they are entitled to recover, are entitled to the fair market value of the safes, with interest from the time of the conversion. This does not mean, necessarily, the wholesale price of the safes, sold together in one body to a single purchaser, but such

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price as at the place where they actually were, they would have brought, either singly or in parcels, as good judgment would dictate, when offered for sale, to such purchasers as would be likely to present themselves, or as would be convened at a public sale upon proper notice. Tested by these rules, I am of opinion that the fair price of the safes was, on the 5th of November, 1857, 95 per cent of what is called in the evidence the list prices, with freight added, and interest thereon from the last mentioned date. I think such is the price with which the plaintiffs themselves would have been chargeable, as between them and Bates, if their transactions had closed on the 5th of November, 1857. And there is no reason why the defendants, if they appropriated the property without right or authority, as they must be held to have done, should be entitled to a more lenient rate of damages.

There must therefore be judgment for the plaintiffs, in each case, for their proper proportion of the above amount, to be graduated according to the stipulation of the parties, as against the defendants in each case, by the amount of their respective judgments against Bates, with costs of the actions, respectively."

From the judgment entered in accordance with the above decision, the defendants appealed, in each case, to the general term.

D. L. Seymour, for the appellants.

J. B. Gale, for the plaintiffs.

WRIGHT, J. I concur in the opinion that the questions, whether there was a valid sale or transfer of the safes to the plaintiffs, and whether title had passed to the latter before the defendants' attachments issued, are to be determined by the law of New York, and not of Illinois. The parties are residents and citizens of this state. Bates, the assignor, re-

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sided here. The instrument, by virtue of which the plaintiffs claim, and which the defendants, as Bates' creditors, seek to invalidate, was executed here. So, also, the debts which constituted the consideration for the transfer, as well as those upon which the attachments issued, were contracted in New York. The legal controversy is pending in the courts of this state. Indeed, the property in controversy was manufactured here, though happening to be in the hands of Bates' agent, in Illinois, at the precise period of the attempted transfer. Under these circumstances, if it should be conceded that the law of Illinois differs from ours, the validity of the transfer is to be tested and determined by the law of this state. The law of the owner's domicile determines the validity of every transfer, alienation or disposition made of personal property by the owner; and the nature and construction of personal contracts is to be controlled by the *lex loci contractus*. This is the general rule *ex comitatu*; but a particular state may, by its statute or customary law, make special provisions in respect to personal property actually within its territory, in favor of its own citizens, as it has entire dominion over it while therein, in point of sovereignty or jurisdiction. A voluntary transfer of personal property, which is valid by the law of the owner's domicile, is valid every where, except the law of the particular sovereignty in which it is situated has abrogated, or is in contravention, in special cases, of the general rule of the public law. It is not to be assumed, in the absence of evidence, that the *lex domicilii* does not govern in Illinois in the case of a voluntary transfer and disposition of personal property by the owner, as well as in this state; nor that if this case were pending in that state, the nature, validity and construction of Bates' assignment would not be determined by the law of New York. The remedy to be pursued *in invitum* as against personal property, is controlled by the state in which such property actually is; but because a citizen of a foreign state may elect to pursue such remedy against the property of another foreign

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citizen temporarily within the jurisdiction of a particular state, it does not follow that a controversy respecting the title of such property is to be determined by the law of the latter state. Were the controversy pending in the latter state, this would be assuming that the *lex domicilii* did not govern them. This litigation, however, which involves simply the question whether property in the safes had passed to the plaintiffs before they were attached for the debt of Bates, is pending here, and, I think, is to be determined by our law.

Now, by the law of this state, was there a valid sale and transfer of the property to the plaintiffs prior to the issuing of the attachments; for if there was, the defendants were not justified in attaching it for the debt of Bates. On the argument, I supposed this to be the principal, and the gravest question in the case. Upon a careful examination, however, I have become satisfied that the transfer was valid, and that Bates, by the instrument executed on the 2d November, 1857, effectually divested himself of all title to the property itself. He manifestly intended to transfer the property directly to the plaintiffs, his creditors, by way of security. No trust was designed; the legal effect of the provisions of the assignment was not to create any; and the legal title passed immediately and absolutely to the plaintiffs. Bates never could have invalidated the sale and reclaimed the property, on the ground of fraud, or that delivery of possession of the subject matter of the assignment, which was at a distance, did not accompany a delivery of the instrument itself. But the court below found that there was no fraud in fact; there is none in law arising from the provisions of the instrument, and no proper parties to raise the question if there had been any; and immediate delivery was not indispensable to consummate a change of title. There may be a valid sale of personal property, and the title will pass to the vendee, though unaccompanied by immediate delivery. Our statute makes an assignment of chattels unaccompanied by an immediate delivery *presumptively* fraudulent as against the cred-

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itors; that is, the judgment creditors of the person making such assignment, or subsequent purchasers in good faith; but even as respects these classes of persons, (and they are the only ones that can raise the question of fraud,) it is not required that delivery should accompany the written instrument of transfer, to pass the title to the thing transferred. The fact that the assigned property was not delivered simultaneously with the instrument, does not prevent a change of ownership; but only casts suspicion upon the fairness and good faith of the transaction, and, as against the creditors of the assignors, or subsequent purchasers without notice of the assignment, throwing the *onus* upon the assignee to show that the assignment was made in good faith, and without any fraudulent intent. If the assignment in this case was valid, and passed the title to the safes, as against Bates, it was equally so against the defendants, who were only creditors at large, and not in a position to attack such assignment as fraudulent. They had not proceeded to judgment and execution, and thereby placed themselves in a position that the assignment interfered with the assertion of their right to the property in question; and until this was done, they were equally bound by Bates' acts, as Bates was himself. The act of attaching, as creditors at large, the assigned property, did not put them upon the footing of *bona fide* purchasers for value without notice, so as to enable them to call in question the validity of the act of Bates in disposing of such property. Were this otherwise, however, there is no provision of the assignment having the effect to hinder, delay or defraud Bates' creditors. It is true, that the effect is to give a preference to certain of his creditors, which he had the right to do; but if the transaction is to be regarded as clothing the plaintiffs with a trust, there is no provision of the instrument operating as a restraint upon the discretion of the trustees, or any conditions imposed which would hinder or delay Bates' creditors in reaching any surplus that might remain after the satisfaction of the plaintiffs' demand. With regard

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to the provisions as to the mode of selling, and the price to be obtained for the assigned property, I entirely concur in the view taken, and the construction placed on them, by the learned judge at the circuit.

If the title to the property had been changed, it could not be legally attached for a debt due from Bates. It was no more lawful, in Illinois, to attach A.'s property for the debt of B., than it would have been in New York. It is supposed, however, that because the plaintiffs had notice of the attachment suits, and permitted them to go to judgment undefended, they are in some way concluded or estopped, by such judgment, from contesting in the courts of this state the title to the property. This cannot be so. The plaintiffs were not bound to interpose their claim of title in the suits in Illinois, or be barred. They were not parties, or, in any legal sense, privies to that litigation. Because the defendants had chosen to attach their property for the debt of another, and they were casually notified of the illegal act, and suffered the proceeding to go undefended, they are not consequently concluded by the judgment subsequently obtained. The defendants were wrongdoers in issuing and levying the attachment, and the subsequent acts of taking judgment and selling the property, were but further illegal steps. In pursuing their remedy against the property they could only acquire and sell, by force of their judgment, the title and interest of Bates, if he had any. If they wrongfully attached the property of strangers, though those strangers may have been casually informed of the proceeding and did not come in and defend, or demand a delivery of the property and bring suit, I am unable to perceive how a judgment against Bates, or *in rem* as against the property of Bates, can estop the real owners of the property from asserting their title in an action against the wrongdoers.

I think that the action was well tried, at the circuit, and that the judgment is right. I vote for an affirmance of the judgment.

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HOGEBROOM, J. (After stating the facts.) Under these circumstances the question arose, which party was entitled to prevail ; in other words, which party was to be regarded, in this state and in these actions, as having the better title to the iron safes. My brother Gould is of opinion that the judgment of the circuit court was erroneous and should be reversed, for the reason that the defendants are protected by the *judgment* which they have obtained in the attachment suits against Bates in Illinois ; that inasmuch as the attachment suits in Illinois were not defended, nor any stay of proceedings obtained therein, nor these suits brought to bar the attaching creditors' title in Illinois, but the attaching creditors were allowed to proceed to judgment and execution, in Illinois, before these suits were instituted, the plaintiffs' remedy, if any they had, was lost ; that the defendants have been allowed to perfect title to the property in Illinois ; that full effect must be given to the judgment of that state, and damages cannot be awarded in the courts of this state against the defendants for asserting, in Illinois, their rights under a judgment of the courts of that state, valid when rendered and valid by relation, and of force from the time of the attachment levied ; that if the plaintiffs had desired to contest the rights of the attaching creditors to the property in dispute, they should have come in and defended in the attachment suit, or should have seasonably demanded the property, and if not delivered, brought suit for it prior to the entry of judgment in the attachment suit ; and that the plaintiffs, by failing to act on the notice which they had of the attachment, in Illinois, and by allowing the attachment suit there to proceed to judgment without interposing there any claim of title, have put themselves in a position where they cannot contest the question ; that by force of the Illinois judgment the property has been sold as the property of Bates, and at the time of the first demand, in New York, of the property in question, by the plaintiffs, of the defendants, the property was in the *custody of the law* in the state of Illinois, and the proper per-

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son of whom to make the demand was the sheriff of Cook county, Illinois, who must be sued in Illinois, and who is not sued here; and that for these reasons the defendants must prevail.

In these views I cannot concur. I cannot perceive any such conclusiveness in the Illinois *judgment*, as against these plaintiffs, as is claimed for it. The proceedings are between different parties. The plaintiffs in this case are in no proper sense either parties or privies to those proceedings, and therefore are not bound by them. The attachment suit and proceedings must have been between the present defendants, as plaintiffs, and John W. Bates, or some one holding under him, as defendant. The present plaintiffs were strangers to them. Nor do I see that the fact that they became cognizant of those proceedings after the levy of the attachment, and before the judgment, can in any manner affect them. They had no right—at least they would have no right in this state—to intervene in those proceedings. My learned brother supposes that in Illinois the assignees would have *had a right* to come in and defend the attachment suits. I do not know how this is; but it would be necessary to go at least one step farther before those proceedings could assume the character of an estoppel; to wit, that the assignees should be *bound* to come in or be barred. In such event, it is possible that the judgment would be conclusive upon the present plaintiffs as being one to which they were in effect either parties or privies. But I know of no such law or adjudication in Illinois, and it has not been contended for by counsel in this case.

The Massachusetts cases of *Whipple v. Thayer*, (16 Pick. 25,) *Daniels v. Willard*, (*Id.* 36,) and *Burlock v. Taylor*, (*Id.* 335,) all hold that an assignment made by an insolvent, in another state, valid by the laws of that state, is valid in Massachusetts, so far as to protect personal property situated in Massachusetts at the time of making it, against an attachment in Massachusetts made by a citizen of the state where

the assignment was made. It is true the question was tested by a suit brought in Massachusetts by the assignees, against the attaching creditor, or the officer levying the attachment, previous to judgment in the attachment suit. But I cannot see how the position or rights of the assignees would have been prejudiced by waiting until after a sale upon execution, under the judgment in the attachment suit. Taking judgment, issuing execution and making sale thereupon, would only have been *additional* illegal steps to the *primary* one of issuing and levying the attachment upon property not subject to it.

The Massachusetts decisions do not, therefore, as has been supposed, favor the views contended for on behalf of the defendants. On the contrary, if they prevailed in Illinois they would be decisive to show that if the present plaintiffs had brought this action there, they, as citizens of New York, showing title to property in Illinois valid by the laws of New York, where the assignment was made, as against the defendants, citizens also of New York, would have been successful against the defendants in Illinois.

The Illinois proceedings are not therefore an estoppel, and we are driven back to the two questions, first, whether in a case like the present the law of Illinois or the law of New York is to govern; and if the latter, then whether the plaintiffs' title is superior to that of the defendants by the law of New York. I have debated these questions at sufficient length in the opinion delivered at the circuit, and I have seen no reason, since the more extended and elaborate argument here, materially to change the views then expressed.

Perhaps some of the grounds upon which the propriety of determining the right to the property in question by the law of New York, in preference to that of Illinois, rested, were not made sufficiently prominent in the opinion delivered at the circuit. They may be briefly enumerated as follows:

1. The contracting parties to the contract or purchase under which the plaintiffs claim title, were citizens of the state of

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New York. 2. The instrument under which the plaintiffs claim was executed and delivered in the state of New York, and the consideration upon which it was based arose in that state. 3. The instrument under which the plaintiffs make title was a voluntary sale or assignment, and not a compulsory one. By a voluntary one is here intended not one without consideration, but one without compulsion—voluntary, as done by the party's own choice and not *in invitum*. 4. The defendants are also citizens of the state of New York. 5. The debts for the collection of which the defendants' attachment proceedings were instituted in Illinois, were contracted and arose in the state of New York. 6. The attachment debtor also resides in the state of New York. 7. The forum of controversy is also in the state of New York.

The only facts upon which the defendants rely are that the property in controversy was situated in the state of Illinois, and was seized there under attachment proceedings regularly issued in Illinois.

These being the facts and circumstances of the case, I understand the law of the state of New York takes preference. (*Hoyt v. Thompson*, 1 Sel. 352. *Story's Confl. of Laws*, §§ 379, 380, 383, 384, 411. *Holmes v. Remsen*, 20 John. 258. *Abraham v. Plestoro*, 3 Wend. 566. *Johnson v. Hunt*, 23 id. 96. *Martin v. Hill*, 12 Barb. 631. *Tyler v. Strang*, 21 id. 198.)

In the case of *Martin v. Hill*, (12 Barb. 631,) the plaintiff was the mortgagee under a chattel mortgage of certain oxen owned by one Willard, who was indebted to him, and which oxen were left in the possession of the mortgagor under circumstances rebutting the idea of fraud or bad faith. By the law of Vermont such a mortgage, unaccompanied by possession, was void. The mortgagor and mortgagee resided in Washington county, New York. The mortgagor having taken the oxen into the adjoining town of Fairhaven, in Vermont, they were seized upon there by the defendant, who was a constable of that town, by virtue of an execution upon

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a judgment obtained in Vermont against the mortgagor, by certain citizens of that state. This action was brought to recover their value, and it was held that the nature, construction, obligation and effect of the mortgage must be determined by the laws of this state, and that the *lex loci contractus* controls as to the validity and construction of personal contracts, and that the plaintiff was entitled to judgment. This was, however, but a special term decision.

In the case of *Tyler v. Strang*, (21 Barb. 198,) it was held at general term, in the 7th district, that where both the assignor and assignee of a contract are citizens of this state, and the assignment is executed in this state, and the subject of the contract is personal property, upon the general principle that the *lex loci contractus* controls the nature, construction and validity of the contract, the validity and effect of the assignment, and the delivery and change of possession of the property necessary to sustain it, depend upon our laws, although the property itself is situated in another state.

I cite these as comparatively recent cases in our own court in support of the general doctrine, maintained, I think, by the general current of authority, in favor of the applicability of the law of New York to the adjustment of the legal rights of the parties to this controversy.

I think the judgment of the circuit court was correct, and should be affirmed.

GOULD, J. (dissenting.) I find the opinion of a majority of the court conveying, as it seems to me, an erroneous impression of the law of the state of Illinois. And as I deem that law to have a controlling effect in this cause, I make my opinion on that point more full and particular than the one I submitted at the term.

It is fully proved, and indeed the plaintiffs admit, that by the undisputed law of that state, had these plaintiffs undertaken *there* to claim this property, as being theirs by the assignment from Bates, the defendants, as creditors of Bates,

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having by their attachment obtained the *first actual* possession, would have held the property. That is to say, by the law of Illinois, the property was *then Bates'* as in favor of the attaching creditor whose attachment was levied, against the assignees, whose attempt to take *actual possession* was subsequent to that levy.

The defendants, having thus attached what, by the law of the land where they sued, was *Bates'* property, pursued their remedy to judgment, (the property being all the time in the custody of the law;) and under an execution on that judgment they sold *Bates'* property. *After* that sale, the plaintiffs in New York commence this suit against the defendants, for having committed a trespass in selling the *plaintiffs'* property, on that execution; as, by the law of *New York*, the assignment passed the *title* of this property to the plaintiffs, prior to the levying of the attachment.

There is no pretense that there was any attempt, on the part of the defendants, to overreach the plaintiffs; or that there was any unfairness in their proceedings; since the case shows that the suit in Illinois was commenced, and the attachment levied, before the defendants knew that Bates had assigned the property to the plaintiffs. And both parties were *bona fide* creditors of Bates—having equal equities—and both, and Bates, were residents of New York.

To the judgment of the court of Illinois we are bound to give "*full faith and credit*," (*U. S. Const., art. 4, § 1*.) and also to their *public acts*. Now, had the state of Illinois a *statute*, by which this property (as between these two parties) was *Bates'*, and was held *as such* by the attachment, can there be the least doubt that giving full faith and credit to their public acts would compel us to treat this property as *Bates'*, and held by the attachment? Would there be any wrong in saying that when Bates put his property in Illinois, he made it subject to the law of Illinois? And I am unable to see that, because the rule before us is one of the common law of Illinois, it enters any the less absolutely into the

essence of their judgment. A judgment, in a suit commenced by attachment, acts *in rem*; and where the defendant is a non-resident, and is not personally served with process, it acts *only in rem*; as much so as if the subject of the suit were land situated where the suit is brought. Parties who send personal property to a foreign jurisdiction are as much bound by its laws as to that property as they would be in regard to land there situated, whenever, under that foreign jurisdiction, and by its laws, a lien on, or a right or *title* to, that personal property attaches. In this case, by the law of Illinois, the defendants, when their attachment suit went to judgment, had a lien on this property, (which lien related back to the time of levying the attachment,) and which was by the sale perfected, as of the date of the levy, into a *title*, immediately derived from, and succeeding to, Bates' title. And these plaintiffs never had any title in that state, and by its laws never could have any, as against these defendants.

As I understand the authorities, this view is fully sustained by them. Story (*Conflict of Laws*, § 550,) says, "whenever personal property is taken by arrest, *attachment* or execution within a state, the title so acquired under the laws of the state is valid in every other state." (3 *T. R.* 733. 9 *Mass. Rep.* 468.) For illustration, take a case which would seem closely analogous to the one before us: Were it the law of Illinois that a common carrier has not a lien for his charges upon the goods carried; and were a citizen of this state, acting as a common carrier, to transport for a citizen of this state goods through this state to Chicago; and there the owner of the goods were to take them from their place of storage in disregard of the carrier's claim for, and demand of, his charges, (let the taking be with or without legal process;) could the carrier, (having there made demand of the return of the goods,) on the return of both parties to this state, sue the owner for the taking of the property in disregard of the lien—the *qualified title*—which our law would

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have given him had the property reached the end of its transportation here? Very plainly not.

I think a principle similar to the one I hold, has been held at general term, in the first district. A passenger on a steamboat was killed by an explosion of the boiler, within another state; and the passenger's administrator, being a resident of this state, sued the proprietors of the boat, in our court, under our statute, which gives damages in such cases; and jurisdiction of the persons of the defendants was obtained by due service of process. The defendants demurred to the complaint, and the demurrer was sustained, because *when, and where done*, the act of the defendants gave no right of action under our law, which differed from that of the state in whose jurisdiction the injury was inflicted. (18 *How. Pr. Rep.* 335.) I can see no difference between a case where the statute laws so vary, and one where the common law of one jurisdiction is proved to differ from that of another.

Having at first paid more attention to this point of the case than to the nature and construction of the instrument by which Bates transferred the property to these plaintiffs, I allowed the transfer to pass as a valid one. But upon more careful examination, I am by no means satisfied that a debtor can transfer one part of his property, to secure or pay certain creditors, with a proviso that it shall not be sold, except at a *specified price*, or at such reasonable price as the assignor, or one of the assignees, shall in writing approve. It is a provision for an *indefinite delay* in the application of the property (and the return of the surplus, if any, to Bates or to the reach of his creditors,) at the arbitrary pleasure of the assignor and one of the assignees; and, if valid, *no length* of delay would authorize a creditor to *expedite* their movements. And it must be borne in mind, that if such a transfer of *part* of a debtor's property be good, a like transfer of the rest of it must be. So that, to sustain this transfer, it is necessary to hold that a general assignment with such a provision in it would be good.

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For both, or either, of these reasons, I think a new trial should be had; though I am reluctant to dissent from my brethren.

Judgment affirmed.

[ALBANY GENERAL TERM, May 7, 1860. *Wright, Gould and Hogeboom, Justices.*]

THE PEOPLE, *ex rel.* John E. Smith, *vs.* JAMES TAYLOR, JAMES ROOR and MATHEW DILL, Commissioners of Highways of the town of Shawangunk, Ulster county.

Requisites and sufficiency of an application to commissioners of highways for the laying out of a private road under the statute. (*Laws of 1853, ch. 174, § 1.*)

If the application contains a sufficient description of the land required, to enable the owner to understand what portion of his lands is intended to be taken, and the jury intelligently to determine upon the necessity of the road, and to assess the damages, the intent of the statute is satisfied.

Where, although it did not expressly appear that the jurors were freeholders, no objection was made on that ground, and the parties agreed upon the six persons on the list who afterwards acted as jurors, in making the assessment; it was *held* that the absence of proof that any of them were not freeholders; the failure to object on that ground; and the express assent to the jurors, was sufficient proof that they possessed the necessary constitutional and statutory qualifications; or at least amounted to a waiver of the constitutional provision made for the party's own benefit.

The owner of the land cannot object that the terminus of the road actually laid out is different from that applied for, where it appears that though described under different names the termini are identical.

THIS is a common law certiorari, directed to the commissioners of highways of the town of Shawangunk, Ulster county, to reverse the order made by said commissioners, laying out a private road on the application of Daniel Tears, through the lands of John E. Smith.

The principal point made on the part of the owner of the land is, that the application for the road does not state the

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“location, courses and distances,” as required by the statute. Several other points are made by the owner of the land, *depending* however on the one just stated.

A further ground of error is alleged in this respect, that the terminus of the road as laid is different from the terminus specified in the application. The terminus named in the former being “*Brown’s Turnpike,*” and in the latter the “*Hokerback.*”

By the return of the commissioners, it appears that the application was addressed to the commissioners of highways of the town of Shawangunk, and asked that a private road, “eighteen feet wide, located as follows, and running on the courses and distances as hereinafter specified: Beginning on the south end of a lot I purchased of Alexander Cameron for a road, and following the east side of a swamp to a stone wall, being the west side of the stone wall, and running south along said wall through the woods to the public highway, known as the Hockabarick road, for eighty rods, more or less, through the land owned and occupied by John E. Smith, where said road is proposed to be laid out, in the town of Shawangunk, in said county.”

The commissioners further return, that they presented to the parties the names of eighteen persons who were competent to serve as jurors, &c., out of which number *the parties agreed* that the first six persons named upon such list should determine upon the application, and assess the damages. That the route of the proposed road *was distinctly marked out upon the ground*; that the jury viewed the route thus marked out. That after the jury had delivered their verdict, *at the request of the owner of the land*, the commissioners made a *new survey* of the proposed road upon the *identical* line marked out upon the ground, and described in the notice; that the description of the road in the order is taken from such last survey made at the request of said Smith; that such survey and order is upon the *precise* line described in the application, and marked upon the ground; that the ter-

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minus of the road, called in the application the "Hockabarrick," and in the order as "Brown's Turnpike," is one and the same—the road referred to being known as well by one name as the other.

J. G. Graham, for the relator.

T. R. Westbrook, for the commissioners.

By the Court, HOGEBOM, J. Three objections are made to the validity of the proceedings in laying out the private road in question, which I will consider in their order.

1. It is objected that the statute requires that "an application for a private road shall be made in writing, specifying its width and location, courses and distances," (*Laws of 1853, ch. 174, § 1*.) and that this application gives neither the location, courses nor distances; that the jury, therefore, could not know the line of the proposed road, nor the quantity or location of the land; nor could they properly determine upon its necessity, or the amount of damages to be assessed; that this is a jurisdictional and fatal defect, and vitiates all the proceedings.

The object of the description required by the statute, which also requires the "names of the owners and occupants of the land through which the road is proposed to be laid out" to be stated, is obviously for the purpose of enabling the owner to understand what portion of his lands is intended to be taken, and the jury intelligently to determine upon the necessity of the road, and to assess the damages. If, therefore, this has been substantially done, so as to accomplish these objects, the intent of the statute is satisfied.

Now the *owner* of the land to be taken, and the *width* of the proposed road, are clearly specified; the general location, direction and distance are substantially given; the point of commencement is given with reasonable accuracy, and the general course indicated and limited by prominent, visible,

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natural and artificial monuments. It is true the precise absolute location throughout is not given; nor do I conceive it necessary, being left at liberty slightly to fluctuate according to the views of the jury, and so as to do the least possible harm to the owner of the land. It is true, also, that the *courses*, according to the surveyor's or mariner's compass, are not given; nor the *distances* on each course. But I cannot regard that as absolutely indispensable; especially when it appears by the return that the precise line actually adopted—in all respects conforming to the application—was actually marked out upon the ground—was seen and known by all the parties interested and by the jurors, before assessing the damages, and was at the request of the relator afterwards surveyed and described by courses and distances. The observance of all these precautions renders it clear that no mistake could have been made as to the actual location of the road, the quantity of land taken, or as to the materials from which the jurors were enabled to take an intelligent view of the necessity of the road and make up an intelligent opinion as to the damages. I regard the statute as substantially complied with.

2. It is again objected that the jury were not summoned as required by the statute, and were not freeholders as required by the constitution. (*Art. 1, § 7.*)

It does not expressly appear that the jurors were freeholders. Certainly it does not appear that they were not freeholders; no objection was made upon that ground. On the contrary, it appears that the list being presented, the parties *expressly agreed* upon the six who afterwards acted as jurors in making the assessment. The absence of proof that any of them were not freeholders—the failure to object on that ground—the express assent to the jurors must be deemed, I think, sufficient proof that they possessed the necessary constitutional and statutory qualifications, or at least amount to a waiver of a constitutional provision made for a

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party's own benefit. I do not think this objection ought to prevail.

3. It is objected that the terminus of the road actually laid out is different from that applied for.

The answer is, that this is not so in point of fact, but that they are *identical*, though described under different names. This is expressly stated in the return; and after such a statement, it would be sacrificing substance to form to give effect to this objection.

I think none of the objections made to the validity of the proceedings are well taken, and that therefore the proceedings should be *affirmed*.

[ALBANY GENERAL TERM, September 3, 1860. *Gould, Hogeboom and Peckham*, Justices.]

 CORNING & WINSLOW vs. THE TROY IRON AND NAIL
FACTORY.

Where riparian proprietors own to the center of the stream, that entitles them to have the waters flow in their natural channel, in the bed of the stream.

Where one owns the land only on one side, and to the center of the stream, the right to use the waters, if there be a fall, is a property right which the law will regard as of some value, and which it will not suffer to be invaded or infringed without authority.

A tenant cannot, while occupying and enjoying the premises under his lease, *originate* a possession hostile or adverse to his landlord. Nor can he, during the same period, *continue* an adverse possession previously commenced.

By taking a lease from the landlord, and holding under it, he acknowledges the landlord's title, and right to convey, and will be deemed to have waived any previous and imperfect rights which he has already acquired, under a prior, incipient adverse possession.

The defendants, having a long lease of premises, embracing a water power, diverted the stream from its natural channel, for the use of their machinery. *Held* that there was no ground for the imputation of bad faith against the lessors, or of an implied consent to the *perpetual* diversion of the waters, from their not protesting against such diversion, at the time; inasmuch as

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the lessors might well have supposed that such diversion was only intended to be temporary, and the diverted waters were to be restored, at the end of the term. And that it was only upon the ground of bad faith, or implied consent, that the doctrine of equitable estoppel could arise, in such a case. And the plaintiffs having purchased the premises from the lessors long after the diversion had been made, and the expenditures of the defendants consequent thereon had been incurred, and having commenced a suit for damages, within a short time thereafter, it was further *held* that the doctrine of estoppel did not arise against *them*. GOULD, J. dissented.

And the plaintiffs having taken an absolute conveyance of the premises, without any reservation, it was *held* that the deed must be regarded as passing not only the title to the land, and the water, but the water power, and all the rights and privileges which belonged to the grantors as riparian proprietors.

Held further, that neither the neglect of the plaintiffs to use or appropriate the water power, hitherto; the comparatively inconsiderable actual damage which they had as yet sustained; nor the heavy expenditures to which the defendants would be subjected if enjoined from the further use of the diverted waters and compelled to restore them to their natural and accustomed channel, presented any insuperable objections to equitable relief to the plaintiffs, by injunction to restrain the defendants from diverting the water, and drawing and using the same by means of such diversion, and by decree compelling them to restore the waters to their natural bed or channel, and to pay damages to the plaintiffs.

A party may resort to a court of equity, for relief, in such a case, instead of proceeding by action at law, for damages.

APPEAL from a judgment rendered at a special term, dismissing the plaintiffs' complaint without costs, and without prejudice to an action at law, to recover damages for the alleged diversion of the waters of the Wynantskill.

D. L. Seymour and *A. J. Parker*, for the appellants.

W. A. Beach and *A. B. Olin*, for the respondents.

HOGEBOM, J. This is a suit in equity brought by the plaintiffs to obtain an injunction against the defendants to restrain them from diverting the waters of the Wynantskill from their natural bed or channel through or along the lands of the plaintiffs, by means of a ditch or trunk or otherwise, and from drawing and using the same by means of such di-

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version, and to compel the defendants to restore said waters to their natural bed or channel, and to pay the plaintiffs such damages as they have sustained by reason of such diversion; and for general relief.

The title of the plaintiffs to lands along the Wynantskill, on the north side thereof, and at least to the center of the stream, and the diversion of the waters by the defendants from their natural bed or channel, are sufficiently established by the evidence.

The defendants insist that the plaintiffs have not title, opposite to their premises, to the *whole* of the stream, but only to the *center*; that the defendants have acquired title or the right to divert the stream by *adverse possession*; by the *acquiescence* of the plaintiffs; and by having made, with the *knowledge and approbation* of the plaintiffs, and their grantor, *expensive improvements* dependent for their use and value upon the diverted water power; that the water in its natural bed has not been appropriated by the plaintiffs to any valuable use, and is incapable of being so appropriated; that the damages sustained by the plaintiffs, if any, are merely nominal or trifling; that the restoration of the water to its natural bed will require considerable time and involve ruinous expenditures to the defendants, and that therefore the facts present no case for the intervention of a court of equity. These are the questions presented for the decision of the court.

I. I am of opinion that it is unnecessary to decide whether the plaintiffs have established a legal title to the *entire* bed of the stream opposite the seven acre lot in question, and whether the defendants' premises on the south side extend only to the shore or bank of the Wynantskill. (1.) The description of the premises conveyed to the plaintiffs by the deed of 23d July, 1852, carries the line to the south line of the farm of David Defreest, which evidently was on the south side of the creek. (2.) The exception and reservation is of "one acre of land on the *south side* of the creek and *adjoining* to the creek where the *line crosses* the said creek." This

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description, although not wholly free from ambiguity, must be regarded, I think, under the decisions, as furnishing plausible reasons for limiting the territory to the south *side* of the creek, and making the side, shore, or bank of the creek the boundary. But I do not deem it indispensable to determine that question in the present case.

II. At all events, the plaintiffs own to the *center* of the creek, and that entitles them to have the waters flow in their natural channel in the bed of the stream.

It is not very essential to consider to *how* valuable a use a riparian proprietor may devote the waters of a stream, when he owns only on one side and to the center of the stream. Manifestly, waters thus situated may, if there be a fall, be of *some* value, and the evidence is abundant, I think, that they may be made available to the owner for manufacturing purposes. And it is one of the elements of value that such an ownership places the riparian proprietor in a situation where he can advantageously negotiate with the opposite owner, or make some amicable arrangement for the erection of a dam, or for employing some other mode of using the water power. Moreover, it is a property right which the law will regard as of some value, and which it will not suffice to be invaded or infringed without authority.

The plaintiffs' title being thus established, it becomes necessary to inquire whether it has been in any way lost or impaired.

III. The defendants claim to have acquired the right to divert the water by an uninterrupted and hostile use of the same in the manner now enjoyed by them, for more than twenty years before the commencement of the action. But I think they have failed to establish the *fact* of such use; and such was the opinion of the learned judge who decided this cause at the special term. (1.) It is not altogether clear that the use of it by the defendants, prior to 1817, was exclusive or hostile to the true owners. (2.) On the 1st of May, 1817, the defendants, or their agent, took a *lease* from

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the Defreests (under whom the plaintiffs claim) of the seven acre lot in question, and of the water power, for thirty-four years and nine months. Under this lease they occupied and enjoyed the premises, and of course could not *originate*, during that time, a hostile or adverse possession.

Nor could they, during the same period, *continue* an adverse possession previously commenced. By taking a lease from the Defreests, they acknowledged their title and right to convey. They held under their title, and recognized it as the true title. They must be deemed to have waived any previous and imperfect rights which they had already acquired under a prior incipient adverse possession. The doctrine of cumulative disabilities does not apply. The defendants are prevented from setting up during this period an adverse possession, not for the reason that they could not purchase an outstanding title for the purpose of perfecting their rights or quieting their possession, but because by taking a lease from the Defreests they had placed the latter under a *disability*, in a position where they could not take proceedings to oust the defendants, and where of course the statute of limitations should not be permitted to run against them.

It would seem, therefore, entirely clear, that as this lease did not expire until 1852, the defendants cannot avail themselves of the defense of *adverse possession*.

IV. Nor do I think the plaintiffs are estopped from maintaining this suit by any knowledge or approval of, or consent to, the expensive improvements made by the defendants.

It is undoubtedly true that both the Defreests and the plaintiffs were cognizant of the diversion of the water, at an early date, and of the building of the reservoir dam which, with the construction subsequently of the artificial channel, had the effect to divert the water from the premises of the plaintiffs, and seriously to impair the supply of water power at that point. And it is undoubtedly true that these expenditures, made by the defendants with the knowledge and, to

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some extent, the concurrence and approbation of the Defreests and the plaintiffs, were heavy, and must result in large pecuniary sacrifices to the defendants, if an injunction should issue and a restoration of the waters to their natural channel be enforced.

And if the plaintiffs were in a situation where they were bound to protest against these expenditures, or be forever barred; or if they occupy no other or different relation to the defendants than they did at the time these expenditures were incurred, then undoubtedly the rule contended for applies, but not otherwise. But the fact is, that the plaintiffs occupy an entirely different position from what they did at that time; and it is their rights in this new position which are the subject of investigation and controversy in this action.

It was not till 1852 that they purchased the seven acre lot, and as to *those* premises I think the doctrine of equitable estoppel cannot be applied to them before that period. It may be true—it probably is true—that if *at that date* the defendants had matured a title or right of diversion as against the Defreests, who were the grantors of the plaintiffs, so that an equitable estoppel then existed as to the Defreests, it ought also to be applied as against the plaintiffs, upon the ground that the Defreests ought not to be allowed to convey, nor the plaintiffs, under the circumstances, to acquire, a better title in this particular, than the Defreests themselves possessed. But I do not see that the Defreests were *estopped*. And for the reason that they had no right to object, and *then* had no present interest in the premises in dispute. The defendants had a lease of the premises, and the Defreests could not know, and were not called upon, I think, to ascertain, that the diversion of the water was intended to be perpetual or permanent. The defendants did no more than they had a right to do, at that time. And the Defreests might well conclude that the expensive improvements which the defendants made were made understandingly by the latter, in the expectation of reaping remunerative results during the long lease which

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they had taken, and with the intention of fulfilling their legal obligation to restore the diverted waters at the end of the term, or consummating before that period some satisfactory arrangement with the proper parties for a continuance of the diversion after that period. This appears to me not an unreasonable presumption, considering the situation and relations of the parties; and hence there is no ground for the imputation of bad faith against the Defreests, or implied consent to the perpetual diversion of the waters, from their not protesting against such diversion at the time; and it is only upon this ground that the doctrine of equitable estoppel in this case could arise.

Nor can it arise against the plaintiffs. As before stated, they only took title in 1852. Before that period all the heavy expenditures had been incurred, and since that period none which were not in execution of the plan already adopted, or against which the plaintiffs were bound to protest, or be forever barred, after the lapse of so short a period as intervened between that time and the commencement of this action, on the 4th of March, 1857.

I cannot concur in the suggestion that the plaintiffs may be supposed to have purchased the premises in question subject to the diversion in question, and divested of the water power. I think they intended to purchase, and did purchase, all the right and title which the Defreests owned at the time and had it in their power to convey. Such is the legal effect of the conveyance. It must be regarded as passing not only the title to the land and the water, but the water power, and all the rights and privileges which belonged to the grantors as riparian proprietors. There was no reservation whatever.

V. It remains only to consider whether the nonuse or appropriation of this water power by the plaintiffs, hitherto, the comparatively inconsiderable actual damage which they have as yet sustained, or even the heavy expenditures to which the defendants must be subjected in case they are en-

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joined from the further use of the diverted waters, and are compelled to restore them to their natural and accustomed channel, present sound and insuperable objections to the relief which the plaintiffs demand. It seems to me they do not. (1.) The omission or delay in appropriating the water power to available use, may perhaps be accounted for in a satisfactory manner—may be owing to a variety of causes, and possibly, in part, to a disability arising from a misappropriation of it by the defendants. It cannot operate to deprive the plaintiffs of a valuable property right. (2.) Nor is the trivial character of the actual damage hitherto sustained a controlling reason for depriving the plaintiffs of their equitable remedy. It may, in part, be an argument in favor of it, if other sound reasons exist for resorting to an equity forum. The appeal to an equitable tribunal is not founded so much upon loss actually sustained, as upon apprehended injury. (3.) Nor, if the defendants are really in the wrong and have been so throughout, is the fact that just reparation to the plaintiffs will involve them in heavy pecuniary sacrifices, a sound reason for a denial of justice. If the defendants have done wrong, they must repair that wrong. If they have willfully or negligently incurred large expenditures in anticipation of or consequent upon the misappropriation or violation of the plaintiffs' property or property rights, they must be regarded as the authors of their own misfortune. They are not at liberty to say to the plaintiffs, "justice to you is ruin to us." The serious consequences which must ensue to the defendants from granting to the plaintiffs the relief which they seek, may be a reason for enforcing the proper remedy in a way which shall be least injurious to the defendants, but not for denying it altogether. (4.) In fine, the resort to an equitable forum seems consonant to the established practice in cases of this description, makes the relief final and comprehensive, avoids a multiplicity of suits, and is equally effective with an action at law, in preventing the ad-

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verse possession of the defendants from ripening into a hostile and perfect title.

VI. The remaining question is, what judgment we ought to render. This is an action on the equity side of the court, and it is not unusual to make a final determination of the action, and to grant such relief as the court below ought to have granted. This is competent for this court to do, and perhaps it is an appropriate exercise of our power, to do so in the present case. All the facts are before the court, and perhaps justice can be as discreetly administered here as upon a retrial before a single judge. In view of the injurious consequences which must ensue from a sudden withdrawal of the water from the defendants' works, and the time requisite for adapting their machinery to the changed state of affairs, I think a reasonable period should be allowed to the defendants to make the necessary changes.

My opinion is, that the judgment of the special term should be reversed; that the plaintiffs should have their costs in the court below and in this court; that an injunction should issue, as prayed for in the complaint; that the defendants should be compelled to restore the waters of the Wynantskill to their natural channel along the plaintiffs' premises; and that the defendants should be allowed the period of one year from the final entry of the judgment, within which to complete the restoration of the water to the natural bed of the stream along the plaintiffs' premises.

My brethren, however, are of opinion that final judgment should not be given. One of them is of opinion that the plaintiffs are estopped by acquiescence, and both conclude that as the case is one of great magnitude in its results to the defendants, and may work the most serious damage, an opportunity ought to be given to the parties to present the facts, if possible, in a different shape. In accordance with their views, the judgment must be reversed, and a new trial granted, with costs to abide the event.

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PECKHAM, J. concurred, but was in favor of granting a new trial, instead of awarding final judgment.

GOULD, J. dissented, but favored a new trial, in preference to final judgment for the plaintiffs.

New trial granted.

[ALBANY GENERAL TERM, September 3, 1860. *Gould, Hogeboom and Peckham*, Justices.]

THE PEOPLE OF THE STATE OF NEW YORK, DAVID M. EARL
and JAMES R. BARTHOLOMEW, *vs.* GEORGE LAW, WILLIAM
RADFORD, JAMES MURPHY and the NINTH AVENUE RAIL
ROAD COMPANY.

Where premises, conveyed by deed, are bounded, in general terms, by a street, the grant extends to the middle of the street, and this, whether the land be situated in the country or in a city.

In either case the owners of the lands adjoining the street have the entire property in the land, subject to the public easement and rights in the street. Accordingly, the adjacent proprietors, having the title to the center of the street, subject only to the public easement, they have a right of property in the streets, which the courts are bound to protect; and which cannot be taken from the owners, except for public use, and upon full compensation. That taking such property for the purposes of a railway, is taking it for public use, is settled by repeated adjudications, and can no longer be regarded as an open question.

Whether the devotion of a street, or highway, in part, to the purpose of a horse rail road, is such a new or additional use as requires a new assessment of damages? *Quære.*

It seems that in all cases where parties are obliged to appeal to the legislature for a grant of the right or power to construct a railway or other improved mode of locomotion, a new assessment of damages should be provided for, and made.

Where this has been done, and provision has been made in a statute chartering a rail road company, for obtaining title in case any person shall own any private right or interest in any of the streets or avenues, over or upon which the rail road is authorized to be laid; and the grantees have accepted the grant with that condition, they must be deemed to have conceded that

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the nature of the improvement called for a new assessment of damages, or to have stipulated to make the same, in consideration of the benefits acquired by them under the grant.

Hence, the adjoining proprietors will be entitled to compensation for an appropriation of their interest or property in a street, to the public use, by the railway company. And the company has no right to enter upon the premises, and take the property of such persons, without first making this compensation, or providing means to make the same.

If it neglects or refuses to make such compensation, or to provide means to make it, an injunction will be granted, to prevent such an appropriation, until compensation is provided.

But the *people*, not being the individual citizens of the state, but the aggregate body of the public, having no property which is traversed or touched by the line of the proposed rail road, and having no private property rights to protect, are not entitled to an injunction.

For an injury to the *property* rights of the city corporation, the corporation has a right of action, and may prosecute the same, in its own behalf. The people are not the proper representatives of those rights.

To an action by property owners, seeking relief against the construction of a rail road in the streets of a city, on the ground that the grant to construct such road is the grant of a franchise, valuable in itself as a property right, and attempted to be disposed of without consideration, or for an insufficient consideration, and in violation of the provisions of the city charter, the city corporation is a necessary party.

So, where the grounds of relief are based upon the abuse of power, by the city corporation, or its agents or servants, the parties whose action is impeached are necessary parties to the suit.

By the act of the legislature of April 14, 1860, to confirm a grant or resolution of the common council of the city of New York, passed in 1853, authorizing the construction of a rail road in certain streets and avenues in said city, (the Ninth Avenue Rail Road,) and to authorize the construction of said rail road, it was intended to confirm and make valid the grant or permission conferred by the resolution and action of the common council, whether regular or irregular; whether valid or invalid; whether the consent was sufficiently or imperfectly given. And the effect of the act was a legislative declaration and adjudication that such consent was intended to be given; and their confirmation was based upon that assumption, and the action of the common council intended to be validated.

This the legislature had the power to do, and by the act in question it effectually ratified the action of the common council.

That act intended to confer, and actually conferred, an original grant of power to construct said rail road. It had that effect, independent of the consent of the common council; and it was effectual in form to accomplish that purpose.

The act of April 14, 1860, was valid and constitutional.

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THIS was an application by the plaintiffs against the defendants for an injunction, and came on to be heard upon an order granted by Justice Ingraham, requiring the defendants to show cause why an injunction should not be granted as prayed for in the complaint, and in the meantime enjoining the defendants and their agents from entering into, or upon, that portion of Greenwich street, in the city of New York, which lies between Fulton street and Vesey street, for the purpose of laying or establishing a rail road therein, or from digging up or subverting the soil, or doing any other act or thing in said streets or either of them, tending to incumber the free and common use thereof, as the same has been heretofore enjoyed, until compensation shall have been made therefor, pursuant to the provisions of the statute, or until the further order of the court in this action.

The injunction prayed for in the complaint, and sought to be obtained on this motion, was broader than the temporary injunction before granted, and was designed to enjoin the defendants and their agents from entering into, or upon, or laying or establishing their rail road upon, any part either of Greenwich or Washington streets, in the city of New York; and the prayer of the complaint further is, that by the judgment of the court, the injunction may be made perpetual.

The plaintiffs Earl and Bartholomew claim to be owners in fee, and in possession of lot number 196 Greenwich street, situated, with the building thereon, on the westerly side of Greenwich street, between Fulton and Vesey streets, and extending along Greenwich street twenty-four feet and ten inches. Earl and Bartholomew claim title by a deed from the mayor, aldermen, and commonalty of New York, to John Salisbury and Isaac Graham, dated the 8th day of March, 1813, conveying to the grantees therein the lot aforesaid therein described, as "situate, lying and being on the westerly side of Greenwich street," and the easterly boundary is therein stated as follows, to wit: "bounded easterly in front by Greenwich street aforesaid." It is further described as

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“containing in front on Greenwich street aforesaid, twenty-four feet ten inches,” “and in length on the northerly side, sixty-one feet six inches.” The same premises were subsequently conveyed to the plaintiffs Earl and Bartholomew. It is claimed, on the part of the plaintiffs, that these conveyances give title to the center of Greenwich street, subject to the public easement and rights in the street, and this is one of the controverted points in the case.

A resolution of the common council of New York, originating in 1852, and passed by the board of aldermen on the 22d of March, 1852, amended and passed by the board of assistant aldermen on the 20th of December, in the same year, and passed, as amended by the board of aldermen, on the 5th day of January, in the year 1853, vetoed by the mayor of New York on the 12th day of January, 1853, and again passed, over the mayor's veto, by the board of aldermen, on the 14th of November, 1853, and by the board of assistant aldermen on the 18th of December, 1853—said board of assistant aldermen being in 1853 composed of other and different persons than in 1852—granted to James Murphy, William Radford and Minor C. Story, and their respective assigns and associates, the right and privilege to construct a rail road from Fifty-first street through the Ninth avenue, and Gansevoort, Greenwich and Washington streets to the battery and Battery place, with certain provisions, limitations and conditions therein contained, one of which was, that in no case should steam power be used on any part of said rail road. Story having died, the defendant George Law became his executor and personal representative; and said Law, Radford and Murphy are made defendants, as claiming rights and interests under said resolution, and also under an act of the legislature of the state of New York, passed April 14, 1860, to confirm the said grant or resolution of the common council, and to authorize the construction of said rail road.(a)

The Ninth Avenue Rail Road Company is a corporation

(a) Laws of 1860, p. 715.

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created by the laws of this state, and is made defendant, as claiming some right by way of assignment or otherwise, under the said grant or resolution; and under the act of the legislature in question, the right to enter upon Greenwich and Washington streets, for the purpose of laying, establishing and operating a rail road therein.

In an action brought by Apollos R. Wetmore and others against George Law, executor of the last will and testament of Minor C. Story, deceased, and against others, and reported in 22 Barb. 414, the before-mentioned resolution and grant were declared inoperative and void, and mainly for the reason that the common council of New York were a local legislature, and could not pass a valid act, ordinance or resolution, unless both boards gave their assent thereto, during the same year in which the same originated. The act of the legislature of April 14, 1860, before mentioned, purported to confirm and make valid and effectual the grant or permission given, or intended to be given, by the common council of New York, by the resolution aforesaid, and also confirmed all powers, privileges and rights thereby granted or conferred, or intended to be by such grant or resolution, notwithstanding any irregularities. And said act further authorized and empowered the before-mentioned persons, or their assigns, to lay, construct, operate and run a rail road over, upon and through the avenues, streets and places, in said resolution mentioned, together with the necessary turnouts and switches for the proper working of said road. The act further provided, that in case any other person or persons than the mayor, aldermen and commonalty of New York, should own any private right or interest in any of said streets or avenues, and there should be an inability to agree for the use of such right or interest for the purposes aforesaid, the right to use the same for such purpose might be acquired under the provisions of the general rail road act of April 2, 1850.

Under the authority of this act and of the resolution aforesaid, the complaint alleged that the defendants entered

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upon Greenwich and Washington streets aforesaid, took up the pavements and subverted the soil in part, and were continuing to do so, and had taken possession of, laid down and established a rail road over a considerable portion thereof, and threatened further to continue and prosecute the aforesaid acts and proceedings, and to establish and operate said rail road through the entire length of said streets (including the portions belonging to Earl and Bartholomew, as aforesaid,) without making any compensation therefor, and without paying or providing for the payment to the plaintiffs, or any other property owners, of the damages resulting to them and their property from the taking of their land and the laying of said railway, and without instituting any proceedings to acquire the right to use said streets or property for the purposes of said rail road, and without making any compensation to the mayor, aldermen and commonalty of the city of New York, for the benefit of the city, or of those represented by them. Wherefore they pray for said injunction in behalf of the plaintiffs, and of all other property owners on Greenwich and Washington streets, and of all other citizens and tax payers.

They found their application for the injunction on several grounds, the more material of which are the alleged invalidity of said resolution, and of the act of the legislature; that the streets are under the control of one of the executive departments of the corporation, known as the street department; and the corporation could only act through such department in making the contract, or conferring the authority in said resolution mentioned; that the construction of said rail road would materially interfere with the use of said streets as highways, and with the business purposes of the adjoining lot owners and occupants, and would be both a public and a private nuisance; that the power to authorize the construction of said rail road, if possessed by the corporation, is a grant of a franchise which by law must be sold and disposed of at public auction, and to the highest bidder;

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or if not so required to be sold by law, said franchise should have been either disposed of at public auction to the highest bidder, in order to subserve the interests of the tax payers and travelers, or else granted to the responsible parties who made voluntary offers to take the same and pay a liberal compensation therefor; that the grant of the authority conferred by said resolution was a fraud upon the plaintiffs, the citizens and the traveling public, and the passenger fare allowed to be charged thereby was extravagant; that the consent of the mayor was necessary to said grant or resolution, and that the same is void; that the people of the state have a public property and a perpetual right of way in said streets, and that the aforesaid act of the legislature is void, inasmuch as it appropriates the public property in said streets for private purposes, without having received the assent of two-thirds of the members elected to each branch of the legislature.

W. Allen Butler, John Van Buren and W. Curtis Noyes,
for the plaintiffs.

Charles O'Connor, C. L. Monell and H. W. Robinson, for
the defendants.

HOGEBROOM, J. This application for an injunction is made on behalf of the people, and also on behalf of the plaintiffs Earl and Bartholomew. The reasons upon which the application rests are different in the one case from those in the other. I will first consider the question as to the plaintiffs, Earl and Bartholomew.

I think the title of Earl and Bartholomew to the lot claimed by them, which is bounded in general terms by Greenwich street, extends to the middle of the street. Such is certainly the general rule applied as to property having similar boundaries. (3 *Kent's Com.* 433. *Jackson v. Hathaway*, 15 *John.* 447. *Hooker v. Utica and Minden Co.*, 12 *Wend.* 371. *Albany street*, 11 *id.* 149. *John and Cherry streets*, 19 *id.* 659, 675.

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Heyward v. The Mayor, 3 Seld. 317. *Davis v. Mayor*, 4 Kern. 506. *Williams v. Central R. R. Co.*, 16 N.Y. Rep. 97. *Imlay v. Union Branch R. R. Co.*, 26 Conn. R. 249.) And this is so, whether the intervening object between what would otherwise be adjoining land owners, be land or water, a street or a highway, or a stream of water. (*Jackson v. Hathaway*, 15 John. 447. *Adams v. Saratoga and Washington Rail Road*, 11 Barb. 414. *Ex parte Jennings*, 6 Cow. 518. *Luce v. Carley*, 24 Wend. 451. *Demeyer v. Legg*, 18 Barb. 14.) It is conceded to be the rule as to land in the country, and I think it equally applies to urban territory. (*Hammond v. McLachlan*, 1 Sandf. S. C. Rep. 323. *Her-ring v. Fisher*, 1 id. 344. *Adams v. Rivers*, 11 Barb. 390.)

The reason is substantially the same as applied to a road in the country, or a street in the city; that is, the intervening strip was originally taken, or supposed so to be, for public purposes, from the owners on opposite sides of the street or highway, taken only for public purposes, and only so much of it both in regard to the quality and duration of the estate as was supposed to be required for the public use, and is to be returned to the respective proprietors when the public have no farther use for it; or else it was founded upon principles of public policy, based upon the supposed inconvenience or impropriety of having so long and narrow a strip of land or body of water, the subject of a distinct and separate ownership from that of the adjoining territory on either side. In other words, the owners of the adjoining lands have the entire property in the land, subject to the public easement and rights. It may be true, that as regards land in the city, the use of the public is more extended and comprehensive than in the country. It is wanted not only as a road for purposes of passage and transportation, but also for sewers, for vaults, for gas pipes, for water pipes, and other purposes. But the essential characteristic of both is the same, to wit, the public use or necessity. So also the country may ultimately become a town, the town may be-

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come a city; and it would lead to embarrassment if different rules of construction were applied to *country* and to *city* grants, as well as to difficulty in determining when the actual transmutation from country to city property took place. Whether, therefore, we consider the question as one of naked law upon the construction to be given to a legal instrument, or as a rule of evidence to be applied to those instruments for the purpose of ascertaining the real intentions of the parties, I think the result will be the same.

In determining the question of intention, I do not think the measurement of the lot is at all a controlling consideration. It always yields to the more certain, marked, and prominent boundaries and monuments. (*Adams v. Saratoga and Washington Rail Road Co.*, 11 Barb. 444. *Hammond v. McLachlan*, 1 Sandf. S. C. R. 337, 344, 348.) Nor do I regard the fact as of material consequence that the alleged lot owners apply to and obtain from the corporation permission to construct vaults under the streets, and pay for such permission. At most it would indicate the mere opinion of the lot owner as to the extent and effect of his deed, but in reality it merely implies that the owner's right is subject and subordinate to the public easement, and that the latter may require the street portion of the lot for some of the subterranean public purposes before mentioned, to avoid which the previous consent of the public authorities is obtained for the construction of the vaults.

This being so, and the plaintiffs Earl and Bartholomew having the title to the center of the street, subject only to the public easement, they have a right of property in the streets, which the courts are bound to protect, and which cannot be taken from them, except for public use, and upon full compensation. That taking it for the purposes of a railway is taking it for public use, is settled by repeated adjudications, and can no longer be regarded as an open question. (*Bloodgood v. Mohawk and Hudson Rail Road*, 14 Wend. 51. 18 *id.* 9. *Thatcher v. Auburn and Syracuse Rail*

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Road, 25 *id.* 462. *Presbyterian Society in Waterloo v. Auburn and Rochester Rail Road*, 3 *Hill*, 567. *Williams v. New York Central Rail Road*, 16 *N. Y. Rep.* 97. *Buffalo and New York Rail Road v. Brainard*, 5 *Seld.* 100.)

Taking it also for rail road purposes has been adjudged to be a new and distinct use from that of an ordinary street or highway, and, therefore, is not supposed to have been embraced in the award of damages to the owner, when the same was appropriated to highway purposes. (*Williams v. The New York Central Rail Road*, 16 *N. Y. Rep.* 97.) It is not, perhaps, indispensable to discuss the propriety of this decision. I do not regard it as absolutely binding, except within the range of the facts of that case. That was the case of rail cars propelled by steam; and it has been very gravely debated, and is now the subject of much discussion, whether the appropriation of a highway to a rail road use, especially where horses, and not steam, are the motive power, is any thing more than the devotion of it to the same general purposes of passage and locomotion as was the original highway. It is still a devotion of the street or road to highway purposes—to the use of the public. It is impossible to tell precisely to what extent or for what precise purposes it ought to be assumed that compensation was made when the land was originally taken. (*Kelsey v. King*, 11 *Abb.* 184. *Tucker v. Tower*, 9 *Pick.* 109. *Plant v. Long Island Rail Road Co.*, 10 *Barb.* 26.) It was taken for public use, and for the purposes of a highway or street; and yet it has not been doubted that the public authorities might subvert the soil, and lay down sewers, and gas mains, and water pipes, and make vaults and cess-pools. I am not aware that, in any of these cases, the public authorities make any additional compensation to private property owners for the apparently new servitude to which the street is thereby devoted. And in all the statutes to which I have referred, incorporating gas or water companies, although provision is made in most of them for compensation for lands taken, yet, when the gas or

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water pipes are laid in or under a public street, the provision generally, if not universally, is, that they may be so laid with the consent of the municipal authorities, and no provision is made for compensation to the private owners; still none of these last named come within the legitimate definition of strictly highway purposes. And when the charters of railway companies allow them to run upon, cut, or intersect the ordinary highways of the country, which is often done, provision is made for restoring them, as far as may be, to their former grade or usefulness; but not, so far as I have observed, for making compensation for any interest which the owner of the fee may have in the highway.

The object of a highway is to furnish accommodations for the passage and transportation of travelers and freight. But it has never been said what precise vehicles shall be employed, nor what mode of locomotion adopted. It is conceded that these highways may be used by foot passengers, by the ordinary carts, wagons, carriages and coaches, and they have never been restricted in size. May they not be used by the omnibus and the rail road car? It is very true, the proper use may be regulated, and the excessive size may be restrained, by the public authorities. But this is a matter appertaining to the police or good government of the road, and not a matter arising under the question, whether it is an appropriation of private property to new public uses requiring additional compensation. It is worthy, at least, of consideration, whether the partial control and superintendence which the local and state authorities confessedly have over the public and private vehicles which occupy and traverse the streets of a city, and which they may, undoubtedly, exercise for the public convenience and accommodation, and for the security, also, of the rights and property of the individual citizen, has not been sometimes confounded with, or mistaken for, the servitude which arises from the appropriation of the street or highway to some novel use, demanding, under the constitution, new compensation to the property owner.

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A rail road car drawn by horses is, in some respects, different from the ordinary vehicles in vogue, when the highway was laid out; (see *Kelsey v. King*, 11 *Abbott's Rep.* 184;) that is, it is usually larger and longer—travels in one uniform line upon a grooved surface—and cannot, ordinarily, turn out to accommodate other vehicles which it may meet. At the same time it occupies the center of the street—is ordinarily out of the way of such vehicles—and its track may, to a considerable extent, be conveniently and advantageously used by the latter. Is it quite clear that this is such a radical departure from the ordinary use of a highway, and productive of such injurious and unforeseen results to property owners along the street, that it requires a new assessment of damages? May it not properly be considered, in regard to rail road cars moved by horse-power, as in the present case, one of those incidents in regard to the use of a public thoroughfare, which must be regarded as within the original contemplation of the parties when the lands were devoted to public use—one of those gradual changes demanded by the increasing wants, prosperity and population of a large city, which must be submitted to by the property owner in deference to the demands of the public? This is not inconsistent with the imposition of a license fee by the public authorities, or with any other reasonable regulations limiting the use of the street.

It is quite possible, as was suggested in one of the opinions in the *Broadway Rail Road* case, (14 *N. Y. Rep.* 530, 531,) that a horse railway might be chartered with authority to the private citizen to run his own car upon the same; but whether so or not, it is not perfectly apparent to my mind that the devotion of a street or highway in part to the purpose of a horse rail road is such a new or additional use as requires a new assessment of damages.

The case of a steam railway is stronger, because the speed is greater, the danger more imminent, the annoyance more

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serious, and the interference with the general use of the road more decided. And I do not say that it is not such a new, unusual, and, to some extent, exclusive appropriation of a highway, that it requires a new consent on the part of the property owner, or a new compulsory assessment of damages. It is difficult to lay down any precise test. Perhaps it would be wise to say, that in all cases where parties are obliged to appeal to the legislature for a grant of the right or power to construct the railway or other improved mode of locomotion, a new assessment of damages should be provided for and made.

In the case under consideration, this has been done. Provision has been made in the act of the legislature in question, for obtaining title in case any person (other than the corporation of New York) shall own any private right or interest in any of the streets or avenues, over or upon which the rail road is authorized to be laid. The legislature has provided this mode of acquiring title. The defendants have accepted the grant with this condition, and must be deemed, therefore, to have conceded that the nature of the improvement called for a new assessment of damages, or to have stipulated to make the same in consideration of the benefits acquired by them under the grant.

I must, therefore, hold that the plaintiffs are entitled to compensation, whether it be great or small, for the contemplated appropriation of their interest or property in Greenwich street to the public use by this railway company.

If this is so, then the defendants have no right to enter upon their premises, and take their property without first making this compensation, or providing means to make the same.

And if they neglect or refuse to do so, then, I think, an injunction is proper to prevent such appropriation, until compensation is provided. For

1. It is the usual remedy, or one of the usual remedies, and established and recognized by repeated adjudications of

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our courts. (*Davis v. The Mayor of New York*, 14 N. Y. R. 526. *Williams v. N. Y. Central Rail Road*, 16 *id.* 97. *Attorney General v. Cohoes Company*, 6 Paige, 133. *Livingston v. Livingston*, 6 John. Ch. Rep. 497. *Wetmore v. Story*, 22 Barb. 415. *Corning v. Lowerre*, 6 John. Ch. Rep. 439. *Lawrence v. The Mayor &c.*, 2 Barb. S. C. Rep. 577.)

2. The taking of this property without compensation is a palpable act of usurpation, a violation of an absolute property right without pretense of justification, serious in its consequences, permanent in its duration, and in a certain sense, of irreparable injury to the proprietors. (*Story's Com. on Eq. Jur.* §§ 907-909. *Code*, § 219. *Benson v. Mayor of New York*, 10 Barb. 226. *Davis v. Mayor*, 14 N. Y. Rep. 506. *Milhau v. Sharp*, 17 Barb. 445.)

3. If the injunction is not granted, it will furnish occasion for numberless trespass suits, and involve the parties in perpetual litigation.

4. There are probably other parties along the line of Greenwich and Washington streets similarly situated, and having similar rights of property with the plaintiffs Earl and Bartholomew, and the preventive remedy by injunction will therefore probably save large expense, as well to the defendants as to the plaintiffs and others similarly circumstanced.

My conclusion therefore is that the temporary injunction was rightfully awarded, so far as it applies to the taking of the property of Earl and Bartholomew, and should be continued.

There is no direct evidence before me that it covers a larger frontage on the street than that occupied by the plaintiffs Earl and Bartholomew, though I think it probable that it does so. It is suggested to me that the general term of the first district have decided that, in a similar case, the injunction might rightfully cover sufficient adjoining territory to protect the injured property owner from the inconvenience and annoyance of the rail road excavations and operations in the immediate vicinity of his premises. I should myself pre-

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fer to restrict it to the property proposed to be actually taken, treating the contemplated action of the defendants as an unwarrantable invasion of a property right; but in deference to the decision of the general term above mentioned, and in the absence of evidence of the width of that part of Greenwich street which lies between Fulton and Vesey streets, and considering also that the extension of the injunction over a few feet more or less of ground, cannot be very material to the defendants, I shall allow the injunction to stand as originally ordered.

The question, however, is a very different one with regard to the other plaintiff. The People, Earl and Bartholomew have no interest in the question of an injunction, beyond the protection of their own property and business. The people have no property which is traversed or touched by the line of the proposed rail road; they are not therefore in a situation to require an injunction on that ground. The people, in the characters in which they sue as plaintiffs in this action, are not the individual citizens of the state, but the aggregate body of the public. Nor is the action brought for the benefit of such other persons as will come in and contribute to the expenses of the action. There are therefore no private property rights to protect beyond those of the plaintiffs Earl and Bartholomew, which have been already considered. The people are not here to protect the private property rights of individual citizens; such citizens must protect their own rights. They do not complain.

Nor are the *property* rights of the corporation of New York in question in this action. The people are not the proper representatives of those rights. The corporation must do that for themselves. They are not parties to this suit. If they are aggrieved, they have a right of action, and are capable of prosecuting in their own behalf. It is not for the people to do so.

For the same reason, it appears to me unnecessary to consider whether the grant of the right to construct this rail

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road is the grant of a franchise, valuable in itself as a property right, and attempted to be disposed of without consideration, or for an insufficient consideration, and in violation of the provisions of the charter. To an action seeking such relief, the corporation is a necessary party; they have a right to be heard. If the injury is done to the rights of the corporation, the corporation is the proper party to seek redress. If done by the corporation, or its authorized agents, the one or the other should be made parties to the action.

The same argument, I think, disposes of all those grounds of relief, based upon the abuse of power by the corporation, or its agents or servants. If the provisions of the charter of New York have been violated—if the common council is incapable of giving a valid consent to, or conferring a legal authority upon, the defendants for the construction of this road—if the franchise should be sold at public auction, or disposed of for a more adequate consideration—if the assent of the street department is essential to the validity of the grant—if the resolution has been passed by the common council, without complying with the requisite formalities, or in fraud of the rights of their constituents, or if in any other way abuses or irregularities have crept into the action of the legislative or other agents of the corporation—these questions ought not to be disposed of without hearing the parties whose action is impeached; and none of them are parties to this suit. I regard that as a sufficient reason for not giving effect to these objections.

But I think there is another effectual answer to these objections: it is, that the defendants' authority to construct this road is not dependent upon the consent of the corporation, but upon the act of the legislature. It is upon that they rely. The true and important question, therefore, to be discussed, is the validity and effect of the statute in question, passed on the 14th of April, 1860. It is important then to consider what this act purports and is intended to accomplish, and whether the power thereby conferred has

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been conferred according to the forms of law, or is liable to any constitutional objections.

In the first place, I think it was intended to confirm and make valid the grant or permission conferred by the resolution and action of the common council, whether regular or irregular—whether valid or invalid—whether the consent was sufficiently or imperfectly given. It has been said that the consent of the common council was never given according to the forms of law, and that, therefore, it is not proper to assume that its consent was ever intended to be given. But I think this is a fallacy, and that the effect of the act in question is a legislative declaration and adjudication that such consent was intended to be given; and that their confirmation was based upon that assumption, and the action of the common council intended to be validated. This the legislature had the power to do; and I think they have effectually ratified the action of the common council, if the legislative proceedings are free from other valid or constitutional objections.

Some criticism is made upon the effect of confirmation, in a legal point of view; and it is said that “a confirmation may make a voidable or defeasible estate good, but it cannot strengthen a void estate.” (*Viner’s Abr. Con. Y. pl. 5. Co. Lit. 295 b.*) This is true; but it must be considered in reference to the subject matter. If the common council of New York had no authority to give their consent in any way to the construction of the Ninth Avenue Rail Road, a mere confirmation of an act thus entirely void and unauthorized, because of want of power over the subject matter, would probably be of no avail. But if the common council had authority over the subject matter to express their consent, provided it be done according to established forms, I think the supreme power would have a right to waive or correct a mere irregularity, and by confirmation give effect to an act in other respects legally done. I am inclined to think, also, that there is something of substance in another distinction

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which may be mentioned. If a *resolution* of the common council, in order to be legally effective, must be passed in a particular way—as by the action of separate boards thereon in the same year—it may be that the *resolution*, as such, is still defective, notwithstanding its confirmation by the legislature; but if the *grant* or *permission*, which is the subject of the resolution, be such as the common council is authorized to confer, and such grant or permission, though irregularly given, be confirmed by the legislature, it strikes me such confirmation would reach back of and beyond the mere *instrument* by which the grant or permission was conveyed, to the *substance* of the grant or permission itself, and make it effective if the exertion of such a power would be within the scope of the powers of the confirming body.

In addition to this, I regard the act in question as intended to confer, and as actually conferring, an original grant of power to construct this rail road; and that it has this effect independent of the consent of the common council, and that it is effectual in form to accomplish this purpose. I infer this from the tenor of the act itself. The words employed are comprehensive enough to convey this meaning; and it appears to have been the legislative intention to go beyond the simple act of confirmation, and, while preserving to the grantees of the common council all the benefits, and subjecting them to all the liabilities, of the arrangements made between them and the common council, as contracting parties, to confer positive authority, and give legislative sanction, to the construction of this rail road. If so, it comes within the very case put by another elementary writer: “Confirmation is the approbation or consent to an estate already created, which, as far as it is in the confirming power, makes it good and valid. So that the confirmation does not regularly create the estate, yet such words may be mingled in the confirmation *as may create or enlarge an estate*; but that is by the force of such words that are *foreign* to the business of

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confirmation, and *by their own force and power* tend to create the estate." (*Gilbert's Tenures*, 69.)

I do not see that this is an act of the legislature, appropriating the public moneys or property to local or private uses. (*Const.*, art. 1, § 9.) It is not an appropriation of the public moneys or property. The streets are not *public property* in the same sense intended by the constitution: they do not belong to the state, or the general public. The public, whether a local or general public, have not (if, as the plaintiffs contend, the right of soil is in the adjoining owners,) such a property in the streets as was intended by the article of the constitution in question, but only an easement therein, (*Gould v. Hudson River Rail Road Co.*, 2 *Seld.* 547,) nor is the appropriation to *local* or *private* purposes. Rail roads have been declared to be public improvements, and taking lands for them, it is settled, is taking them for a public purpose. (*Bloodgood v. Mohawk and Hudson Rail Road Co.*, 18 *Wend.* 77.)

Inasmuch as compensation is provided for in the act, in case the property of private citizens is taken, I see no ground, as far as they are concerned, for saying that the act is unconstitutional.

The act, however, does not provide for compensation to the city in case any of their property is taken. If they have such property, I think the act is invalid and inoperative, if not unconstitutional, as to them. It does not appear in this case whether they have such property or not. If the corporation have the right of property in the public streets, then, as I have already indicated, in the case of *Earl and Bartholomew*, assuming this to be a new appropriation of the highway, I regard it as a property right, for which the corporation were entitled to compensation, and of which it was impossible for the legislature to deprive them.

This raises the vexed question, whether in Greenwich and Washington, and in other streets in the lower part of the city, the right of soil is in the corporation of New York, or

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in the adjoining owners. (*Hoffman's Tr.* 259. *Milbau v. Sharp*, 15 *Barb.* 193. *Bartow v. Draper*, 5 *Duer*, 130.) In the view I take of the law in question, and of the constitutional provision, I do not deem it necessary to decide that question.

So far, as appears, the corporation do not object to this grant. They do not claim compensation. It is, probably, assumed, that they have given their consent to the grant to Murphy and others. The validity of this consent depends (mainly, at least,) upon the question, whether being attested by the passage of the resolution in question by different boards of the common council in different years, it is valid and binding. If it were an open question, I should have some doubt (though I do not express any definite opinion) whether, regarding the board of aldermen, and the board of assistant aldermen, as mere agents of a corporation, having continual succession and unending life, it was essential that the same body of agents should continue to be the exponents of its will, through the initiation, progress and consummation of any particular measure, especially as in this case it appears that both boards did assent to the resolution as finally passed in the course of the same year. But it is not an open question, and has been settled in the contrary way, by the decision of the general term of this court, in the case of *Wetmore v. Story*, (22 *Barb.* 414.)

But assuming that they have not given their consent, I am of opinion that this does not make the act wholly unconstitutional and void, and incapable of confirmation. The corporation may yet give their consent, or they may waive their claim for damages. If so, I think the error is cured. It is a provision exclusively for their benefit, and they may dispense with it if they choose. I think other parties not aggrieved by this omission have not a right to object. The corporation may never claim compensation; and if they do not, I do not see that any other person is injured.

It seems to me it would be an unsound and unauthorized

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interpretation of this constitutional provision to declare the whole act void for such an omission. The act is not absolutely prohibitory in its terms of compensation to the corporation, but omits to make provision for the latter, doubtless upon the idea that its consent to the grant, though irregularly conferred, was designed to be effectually given. It does not seem, therefore, to be a contemptuous disregard on the part of the legislature of the vested rights of the corporation. I think the erroneous judgment of the legislature in this particular ought not to nullify the whole act.

Even if it be conceded that the people are the legitimate parties to bring to the notice of the courts the unconstitutionality of any law affecting any of the citizens of the state, and to invoke their aid to prevent its execution; yet, inasmuch as it is not averred in the complaint that the fee of the public streets is in the corporation of New York, but, on the contrary, that it is in the owners of the land fronting on the respective sides thereof, I think it would be an unwise exercise of judicial power to subvert the act in question on account of the mere possibility that property rights have been unconstitutionally invaded, without any proof of the fact.

The act then being constitutional and valid, as to all the parties to this suit, it must be sustained and enforced. The rail road in question, thus sanctioned by the highest authority in the state, cannot be a public nuisance, nor is it a private nuisance. It has the stamp of legislative approbation. It must be regarded as a public improvement. The forms of law being complied with, and no constitutional provision infringed, neither individuals nor courts have a right to dispute its binding force.

Nor, if it were admissible to inquire into the injurious character of the proposed structure, should I feel disposed upon the evidence before me, and in this stage of the controversy, to pronounce it a nuisance. In a general point of view, whatever may have been the opinion heretofore, rail roads can no longer be regarded as possessing that character. Public sen-

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timent is in favor of their authorization and construction to a reasonable extent, and it must be left to the legislature to declare whether the public exigencies demand their establishment.

The proper disposition of this application seems to me to be to continue the injunction heretofore granted, and to refuse its extension beyond the limits therein prescribed.

The costs of the motion should abide the event of the action.

[NEW YORK SPECIAL TERM, November 5, 1860. *Hogeboom*, Justice.]

APOLLOS R. WETMORE and others *vs.* GEORGE LAW,
executor, &c. and others.

34	515
45	"
15h	
40h	138
42h	25

Where facts have arisen since a judgment was entered, of such a nature that it is clear the judgment ought not to be executed, relief against the judgment may be given upon a motion to vacate the same; provided the facts are undisputed.

Where the ground upon which the judgment was ordered, viz. the absence of any legal sanction to the act enjoined, has since been removed, by authorizing the doing of the act, this will present a *prima facie* case for the application of the rule.

The act of April 14, 1860, to confirm a grant or resolution of the common council of the city of New York, passed in 1853, authorizing the construction of a rail road in certain streets and avenues in said city, (the Ninth Avenue Rail Road,) and to authorize the construction of said rail road, was a legal and constitutional exercise of legislative power. It was intended to confirm, and had the effect to confirm, and make valid the resolution of the common council, and to confer by original authority the right to make and construct the rail road therein mentioned.

A description, bounding premises generally, on or by a street, or highway, or stream of water, not navigable, unexplained, carries the boundary to the *center* of the street or highway, or stream of water.

But where premises were described, in deeds, as "beginning at the corner formed by the intersection of the *easterly* line of Greenwich street with the *northerly* line of Chambers street," and then followed a line southeasterly along the line of Chambers street, then a line *perpendicular* to Chambers street, then a line "parallel with that of Chambers street, 109 feet to the

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said *easterly line of Greenwich street*, and thence southwardly along the same, 79 feet and eight inches to the place of beginning;" it was *held* that the description bounded the grantees to the *easterly line* of Greenwich street, and did not carry them to the center of the street.

Whether an act of the legislature can be impeached for *fraud* not appearing upon its face; and if so, whether it can be impeached in any other manner than by a direct proceeding for that purpose, in analogy to the mode of impeaching a patent? *Quære*.

MOTION to vacate a judgment of the supreme court, entered at a special term, granting an injunction.

W. Allen Butler, John Van Buren and W. Curtis Noyes,
for the plaintiffs.

Chas. O'Connor, Claudius L. Monell and H. W. Robinson,
for the defendants.

HOGEBOOM, J. This is a motion by the defendants to vacate or set aside so much of the judgment entered in this action, pursuant to the direction of Justice DAVIES, as enjoins the defendants from entering upon those portions of Greenwich and Washington streets, in New York, which lie between Reade street and Cortlandt street, for the purpose of laying or establishing a rail road thereon, and from digging up or subverting the soil for that purpose, or otherwise incumbering or obstructing the free and common use of said streets.

The motion is founded principally upon an act of the legislature, passed on the 14th day of April, 1860, purporting to confirm a certain resolution of the common council, granting permission to the defendants, or some of them, to lay down and establish a rail road in said streets; and said act itself, also purporting to authorize the defendants, or some of them, to lay down and establish said rail road therein.(a)

This act was passed *since* the judgment in the above action was entered, which granted the injunction complained of.

(a) Laws of 1860, p. 715.

This injunction was granted, as appears by the opinion and decision of the court, solely upon the ground that the resolution of the common council aforesaid was not legally passed—both boards of the common council not having passed the same during the same year; and hence, that, under the decision of this court in *Wetmore v. Story*, (22 Barb. 414,) it was ineffectual; and that the act of the legislature, of April 4, 1854, exempting rail roads, partially constructed, from the operation of that act, and authorizing their completion, did not embrace rail roads partially constructed without legal authority. The requisite legislative authority to construct this road having been conferred, as claimed by the defendants, by the act of April 14, 1860, and thus the sole ground removed, upon which Justice Davies rested the judgment and injunction in question, the defendants make this motion before the special term to be relieved from the operation thereof.

1. The first objection taken to the motion is, that relief cannot be granted in this summary way against a solemn judgment of the court; that resort should be had to the writ of *audita querela*, and a formal issue made between the parties to test the truth of the matters alleged, and their legal bearing upon the judgment.

I think the modern practice authorizes a resort to this motion, especially if the facts are undisputed. (*Baker v. Judges of Ulster*, 4 John. 191. *Davis v. Sturtevant*, 4 Duer, 148. *Clark v. Rowling*, 3 Comst. 221, 222, 226, 227.) It has been frequently applied for the benefit of a party who has obtained a bankrupt's discharge, and who has had no opportunity, before judgment, to avail himself of that defense. (*Lester v. Mundell*, 1 Bos. & Pul. 427. *Baker v. Judges of Ulster*, 4 John. 191. *Thompson v. Hewitt*, 6 Hill, 254. *Clark v. Rowling*, 3 Comst. 226, 227.) And if it be clear upon the facts presented, which are usually, perhaps always, facts arising *after judgment*, or after the time has passed, before judgment, in which the party can avail him-

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self of them in the action—if it be clear that the new matter is of such a nature that the judgment ought not to be executed—then resort may be had to this summary proceeding, or the party may, at his peril, take the risk of disobeying the positive directions of this court, contained in the judgment itself. Thus, in the celebrated case of the Wheeling Bridge, which had been declared a nuisance, and its construction enjoined, and removal required by the supreme court of the United States, the bridge, after judgment, was legalized by an act of congress, establishing a post road over it, and thereafter the parties who were enjoined, having resumed its construction, were proceeded against for a contempt for violating the injunction of the court, but the court refused to punish them, upon the ground that the subsequent action of congress legalized the defendants' proceedings, and in effect nullified the judgment of the court. (*Pennsylvania v. Wheeling Bridge Co.*, 18 How. U. S. Rep. 421.) But it is the safer and certainly the more respectful course, first to submit the question to the court itself, and obtain its sanction to what might otherwise be regarded as a disrespect of its authority. The defendants were, therefore, justifiable in presenting the question in this form.

And if the ground on which Justice Davies placed his decision, to wit, the absence of any legal sanction either by the municipal or state authorities to the construction of the road, has been removed by the act of April 14, 1860, the defendants certainly present a *prima facie* case for the application of the rule.

I have elsewhere expressed the opinion that the statute last referred to was a legal and constitutional exercise of legislative power, except in a particular contingency as to the corporation of New York—that it was intended to confirm, and had the effect to confirm and make valid the resolution of the common council, whose validity is impeached, and to confer by original authority the right to make and construct the rail road in question. And if Judge Davies was right in the

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conclusion to which he arrived, that the plaintiffs did not establish a title to the land in front of their lots occupied by Greenwich and Washington streets, to the center of the street, but only to the exterior line thereof, then the defendants' motion ought to be granted; for the judgment has no longer any solid foundation on which to rest.

But, after the best consideration which I have been able to give to this case, I have come to the conclusion that the plaintiffs have title to the lots mentioned in their complaint, at least to some of them, to the *center* of the street. I came to that conclusion, after examination, in the case of *The People and Earl & Bartholomew*, against the same defendants, (a) and the cases appear to be in that respect nearly similar. According to the case in this action, the plaintiff, Wetmore, derives title under a deed from the corporation of New York to Mangle Minthorne, dated April 20th, 1785. The premises therein described are bounded "westerly *by a street* or wharf, running along Hudson's river." This afterwards appears to be Washington street. Mangle Minthorne's executors afterwards conveyed the premises to Apollos R. Wetmore and others by deed, dated February 23d, 1825, in which the premises are described as bounded "westerly and northerly in front *on Washington street*." Two subsequent deeds, (the last of which vests the whole premises in the plaintiff, Apollos R. Wetmore, alone,) dated on the 30th of October, 1834, and 1st February, 1843, describe the premises as bounded "westerly in front *by Washington street*."

As I understand the law, this description, bounding premises *generally on or by a street, or highway, or stream* of water, not navigable, unexplained, carries the boundary to the *center* of the street or highway, or stream of water. (*Hammond v. McLachlan*, 1 Sand. 323. *Herring v. Fisher*, 1 id. 344. *Jackson v. Louw*, 12 John. 252. *Jackson v. Hathaway*, 15 id. 447. *Adams v. Saratoga and Washington Rail Road*, 11 Barb. 414. *Adams v. Rivers*, Id. 390.

(a) Ante, p. 515.

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Ex parte Jennings, 6 Cowen, 518. *People v. Seymour*, 6 id. 579. *Canal Appraisers v. People*, 17 Wend. 571. *Commissioners of Canal Fund v. Kempshall*, 26 id. 404. *Luce v. Carley*, 24 id. 451. *Demeyer v. Legg*, 18 Barb. 14.)

On the other hand, the premises of the plaintiffs R. L. & A Stuart are described in deeds to them from the trustees of Trinity church, dated January 14th, 1843, and June 18th, 1849, as "beginning at the corner formed by the intersection of the *easterly line* of Greenwich street with the *northerly line* of Chambers street," then follows a line southeasterly along the line of Chambers street, then a line *perpendicular* to Chambers street, then a line "parallel with that of Chambers street, one hundred and nine feet to the said *easterly line of Greenwich street*, and thence southwardly along the same, seventy-nine feet and eight inches to the place of beginning." Other premises are conveyed to the same parties at the corner of Greenwich street and Reade street, by a similar description, substituting Reade street for Chambers street. I think this description bounds the plaintiffs *Stuart* by the *easterly line* of Greenwich street, and does not carry them to the center of the street. (*Child v. Starr*, 4 Hill, 369. *Kingman v. Sparrow*, 12 Barb. 201. *Halsey v. McCormick*, 3 Kern. 296. *Jones v. Cowman*, 2 Sandf. S. C. R. 234.)

I have not found in the case the description of the premises of Howell Hoppock, and am not therefore in a condition to express an opinion whether those premises extend to the center of Washington street, as claimed in the complaint, or not.

If I am right in my construction of the deed to Wetmore, he owns to the center of Washington street, subject to the public easement, and therefore, as I have stated in the case of *The People v. Law and others*, has a private property in the street, for which, by the act in question and by the constitution and by fundamental principles of right, he is entitled to compensation, and, by the practice in equity cases, to

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an injunction until this compensation is made. It would not, therefore, be proper to vacate the judgment as to him. So far as appears, the other plaintiffs have not a right of property, and are not entitled to compensation. But it cannot be a matter of much practical importance to the defendants to have the injunction dissolved and the judgment vacated as to the Stuarts and Hoppock, if it is retained, as I think it must be, to Wetmore; the great object being, as I suppose, to test the question whether an injunction properly lies to protect any parties whatever owning property on or along the line of these streets. I think it more appropriate, therefore, to preserve the injunction and judgment intact as to all the plaintiffs; especially as the whole subject will speedily receive a more deliberate and careful review at the general term, upon the appeal to that tribunal. On that appeal it will be competent, I think, for the court to consider the whole question as to all the plaintiffs, whether their title extends to the center of the streets, and, if satisfied that it does, to affirm the judgment of Justice Davies, notwithstanding they shall be of opinion that, upon the facts found by him, the injunction could not be sustained.

With a view to impeach the validity of the act of 1860, and to overcome its force, the plaintiffs, in opposition to the motion, read an affidavit, for the purpose of showing unfair practices on the part of Mr. Law and other parties in procuring the passage of that act. The defendants, regarding portions of this affidavit as scandalous and impertinent, have moved to expunge the same. Although I am strongly inclined to think the matter thus presented as wholly irrelevant and out of place on this motion, I have not thought it necessary to criticise it with so much care as to determine whether it should be expunged; particularly as, in all probability, my decision upon the whole question will be subjected to review upon appeal. I therefore deny the motion to expunge. As to the merits of this part of the application, I am of opinion that there are not facts enough stated or established to

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justify the court in imputing unfairness or fraud ; especially to the extent of disregarding the act as void for that reason. Nor should I do so without giving the defendants an opportunity to rebut these statements, if material. Nor am I satisfied that an act of the legislature can be thus impeached for fraud, not appearing upon its face, (*Fletcher v. Peck*, 6 *Cranch*, 87 ;) or that it can be impeached otherwise, *if at all*, than by a direct proceeding for that purpose, in analogy to the mode of impeaching a patent. (*People v. Mauran*, 5 *Denio*, 389. *People v. Livingston*, 8 *Barb.* 253.) I have, therefore, in disposing of the case, laid no stress upon this portion of the plaintiffs' affidavits.

The defendants' motion must be denied, but with liberty to renew the same, if they shall be so advised, after the determination of the defendants' appeal from the judgment in question, or after they shall have consummated the necessary measures for making compensation to the plaintiffs under the act of 1860.

Ten dollars costs of making and opposing the motion may abide the event of the action.

[NEW YORK SPECIAL TERM, November 5, 1860. *Hogeboom*, Justice.]

ALICE YOUTT SPEAR vs. JOHN W. DOWNING and others, executors, &c. of Benjamin Marshall, deceased.

Substantial and radical defects in a complaint may be reached under the general allegation, in a demurrer, that the complaint does not state facts sufficient to constitute a cause of action.

Under section 162 of the code, relative to actions upon " an instrument for the payment of money only," the instrument set forth in the complaint must be an instrument on its face *apparently* valid ; certainly one not *clearly* void. In an action upon the following instrument, " I hereby agree to pay Miss A. Y. twenty dollars per month during her natural life, for her attention to my son J. S. M.," it was *held* that, to make the signer liable, the complaint should aver that the " attention " was bestowed, either in pursuance

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of a *request* previously made, or that it was in its nature *beneficial* to the party promising, so as to operate as a reasonable and probable consideration for the promise. PECKHAM, J. dissented.

Courts ought not to extend the application of section 162 of the code beyond the probable intent of the legislature; or to give a party the benefit of a cause of action by an indirect mode of averment, when he would not have had it if he had put his allegations in proper form, and in express terms.

Per HOGEBOOM, J.

Where a consideration is not implied, or a request is essential to the defendant's liability, it is of the gist of the action, and must be specially averred. When the question of the defendant's liability turns upon the inquiry *for whom*, or at whose *request* the services were rendered, the absence of any allegation in the complaint, on that subject, is not aided or cured by the rule that where a contract is susceptible of a two-fold construction, one of which will make it valid and the other void, the legal presumption is in favor of the validity of the contract. PECKHAM, J. dissented.

The rule of construing pleadings, under the code—that they are to be construed most favorably to the pleader—though admissible on questions of *form*, is not applicable in regard to the fundamental requisites of a cause of action.

Prindle v. Caruthers (15 N. Y. Rep. 425) considered, and distinguished from the present case.

APPPEAL by the defendants from an order of the special term, overruling a demurrer to the complaint. The complaint alleges that the defendants' testator, in consideration of the services therein mentioned, made and delivered to the plaintiff, then a single woman, by the name and description of Miss Alice Yourt, his promissory note or instrument in writing, in the words and figures following, to wit:

“TROY, August 4th, 1846.

I hereby agree to pay Miss Alice Yourt, twenty dollars per month during her natural life, for her attention to my son John Stanton Marshall.

BENJAMIN MARSHALL.”

The complaint then proceeds to allege the death of Benjamin Marshall on the 2d of December, 1858; the grant of letters testamentary to the defendants; that at the time of his death sixteen monthly payments, agreed to be made by the instrument aforesaid, remained due and unpaid, amounting

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to the sum of \$320; that since his decease twenty-one monthly payments, up to the first of September, 1860, have become due and payable to said plaintiff, amounting to the sum of \$420; no part of which has been paid, though duly demanded; and demands judgment for both said sums of \$320 and \$420, with interest on the monthly installments, together with the costs of the action.

The defendants demurred to the complaint, on the ground that the same does not state facts sufficient to constitute a cause of action, and specified the following defects: 1. That the complaint contains no allegation of the performance or bestowment of attention. 2. Nor of the nature, extent or value of such attention, nor that it was of any value.

J. A. Millard, for the plaintiff, (respondent.)

Charles R. Ingalls, for the defendants, (appellants.)

HOGEBROOM, J. I think the complaint is not insufficient for either of the specific defects named in the demurrer. I think the fair inference is that the services or attentions had been already rendered. The omission to state their nature, extent and value, if necessary to be stated, was a defect to be reached by motion under section 160 of the code, and not by demurrer.

But I think substantial and radical defects in the complaint may still be reached under the general allegation that the complaint does not state facts sufficient to constitute a cause of action. (*Code*, § 144. *Durkee v. Saratoga Rail Road Co.*, 4 *How. Rep.* 226. *White v. Brown*, 14 *id.* 282. *Haire v. Baker*, 1 *Seld.* 359. *Connecticut Bank v. Smith*, 17 *How.* 487.)

This brings us to the question principally argued before us, to wit, whether the complaint, on its face, contains the elements of a good cause of action. This depends mainly upon the construction to be given to section 162 of the code, which

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provides that "in an action or defense founded upon an instrument for the payment of money only, it shall be sufficient for a party to give a copy of the instrument, and to state that there is due him, thereon, from the adverse party, a specified sum which he claims." The instrument in question comes within the *literal* description of the kind of instruments mentioned in this section; for it is an instrument for the payment of money only. But obviously something more is necessary. It would seem that it should be an instrument on its face *apparently* valid; certainly one not *clearly void*, for then the instrument would nullify itself.

This instrument is not a *promissory note*, because it was not payable at all events. The death of Alice Yourt, within a month after the date of the instrument, would have defeated any recovery. (*Prindle v. Caruthers*, 15 N. Y. Rep. 430.) In the language of the court of appeals, "it is necessary, therefore, that the promise should from the complaint appear to have been made upon consideration." (*Id.* p. 430.)

There is no allegation of consideration, in the complaint, independent of that, if any, which appears upon the face of the instrument. That consideration, as alleged, is "for her attention (paid or given) to my son John Stanton Marshall."

To make the defendants liable, this attention must have been bestowed, either in pursuance of a request previously made, or must have been in its nature beneficial to the party promising, so as to operate as a reasonable and probable consideration for the promise. (*Ingraham v. Gilbert*, 20 Barb. 152. *Ehle v. Judson*, 24 Wend. 97, 98. *Goulding v. Davidson*, 28 Barb. 438. *Wilson v. Baptist Education Society*, 10 *id.* 308. *Gould's Pleadings*, 176, § 15.)

Here certainly no *request* whatever is averred, and I think not necessarily or fairly implied. The instrument is quite as consistent with the idea that the services were performed without any request at all, or at the request of John Stanton Marshall, as at the request of the testator. It seems to me

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this should not be left to inference. The request is a prerequisite to the liability; and I think the pleader should aver it. While pleadings are not to be condemned for want of form, and are to be liberally construed, I think substantial defects are not to be disregarded. We are not to uphold a pleading simply because a state of facts *might* exist—against what is probable—which would justify an action.

The same considerations apply to the other alternative. I do not see that the services are *presumed* to have been *beneficial* to Benjamin Marshall. They were rendered to *another* person—his son—not alleged, not presumed to have been a minor, or in a situation to make it obligatory upon the father to support him.

If every fact fairly inferable from the terms of this writing were spread out on the face of this complaint in the shape of distinct and positive allegations, the complaint would not have stated a good cause of action. If Benjamin Marshall had declared orally, in so many words, what he has thus expressed in writing, I think no one would have supposed he rendered himself liable to an action.

We ought not, I think, to extend the application of section 162 beyond the probable intent of the legislature, or to give a party the benefit of a cause of action by this indirect mode of averment, when he would not have had it if he had put his allegations in proper form and in express terms. *Some* rules of pleading, in the confusion and anarchy introduced by the code, must still be observed; and one of those is, or ought to be, that where a consideration is not implied, or a request is essential to the defendant's liability, it "is of the gist of the action, and must be specially averred." (*Gould's Pleadings*, 176.)

The case of *Prindle v. Caruthers* (15 N. Y. Rep. 425) is not in conflict with the views here expressed. *There* the consideration, "for value received," appeared from the face of the instrument, and was moreover held to have been argu-

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mentatively inferable from the extrinsic allegation that the defendant made his *contract* in writing. (14 *N. Y. Rep.* 431.)

It is suggested, that the rule that where a contract is susceptible of a two fold construction, one of which will make it valid and the other void, the legal presumption is in favor of the validity of the contract, may help the plaintiff in this case. The rule turns rather upon a question of evidence or presumption than of pleading. If the question here turned upon the *nature* of the services rendered, the rule would apply. But it turns upon the question for *whom*, or at whose *request*, were the services rendered, and the absence of any allegation on this point was never, that I am aware, supposed to be aided or cured by this rule.

It is further suggested that the rule of construing a pleading under the code—contrary to what it was before—is to construe it most favorably to the pleader. I do not admit the existence of the rule, to this unqualified extent. It may be admissible on questions of form; but it cannot be applicable in regard to the fundamental requisites of a cause of action.

The order of the special term should be reversed with costs, and judgment rendered in favor of the defendants on the demurrer, with leave to the plaintiff to amend her complaint on payment of costs.

GOULD, J. concurred.

PECKHAM, J. I cannot concur with my brethren. Though not a promissory note, the paper sued on is a valid contract. The principle *ut res magis valeat quam pereat* sustains its valid construction. "If susceptible of two constructions, one legal and the other invalid, that interpretation shall be put upon the agreement which will support and give it operation." (*Chit. on Cont.* 659, 80. *Lewis v. Davidson*, 4 *M. & Wels.* 654.) The law will not presume this to be the debt of the son, when it is not so stated, in order to avoid it

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by the statute of frauds; nor that the "attention" was to be rendered, when it is quite as plain and consistent that it has been already rendered.

But if this agreement required the aid of external proof, I incline to think that the true construction of section 162 of the code, according to its spirit and intent, dispensed with any averments thereof. The code regards the paper as sufficient notice of the purpose of the action. In fact it can scarcely ever surprise.

There are many cases, under the old forms of pleading, confessedly sufficient, where surprise might be far more safely anticipated. It is conceded that this is within the letter of the statute. It surely harmonizes with the whole spirit of the code, which especially sought to avoid the snares of special pleading. That has been the tendency of our legislation, for years. We who have been educated and have practised under more rigid and technical rules, yield to this tendency with reluctance. This is seen by the decisions under this section, which, I admit, look against what I regard as its true interpretation. It has even been held that an averment must be made, against an indorser, that the note has been protested. This was made unnecessary, by statute, nearly thirty years since, where a copy of the note was served with the declaration; and the code did not intend to take any steps backward, on this subject. Its design was to avoid technicalities of pleading on the way to a trial on the merits; giving reasonable notice to the adversary of the matters in contest. And the prejudices of education may as well yield to the force of legislation, and give effect to its plain enactments.

The demurrer should be overruled.

But it is said that this construction tends to encourage ignorance in the profession, by sanctioning loose pleading and practice. If this be so, the argument is addressed to the wrong tribunal. The practical effect of the provisions of

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the constitution of 1846, and the subsequent legislation thereon, is the admission of persons to the bar after a few months of study, instead of the years previously required.

Order reversed, and judgment for the defendants on the demurrer.

[ALBANY GENERAL TERM, March 4, 1861. *Gould, Hogeboom and Peckham*, Justices.]

CORNING and HORNER vs. THE TROY IRON AND NAIL
FACTORY.

It is erroneous to charge, in an action of ejectment, that an adverse possession by the defendant of the land on and adjacent to the bank of a stream of water, for a sufficient time to mature a title, will be carried, constructively and by operation of law to the center of the stream, without any actual adverse occupancy of the land under water in the stream itself.

Adverse possession should not be permitted to prevail, beyond the limits of the actual possession; and such possession must be marked by distinct boundaries.

To give it effect, there must be *actual* occupancy, measured by a distinct, visible and marked, and not by a presumptive or constructive, possession.

THIS is an appeal by the plaintiffs from a judgment entered on the verdict of a jury, in a cause tried before Justice HOGEBOM at the Rensselaer circuit, held in May, 1860. The action was ejectment, to recover a small tract of land containing about 4650 square feet, located partly on the south bank of the Wynantskill in the city of Troy, and partly in the bed of the stream and immediately in front of the extensive and costly iron works of the defendants. The case is voluminous, and several questions of law and of fact were discussed at the trial and at bar. It is unnecessary to state them at length, as those upon which the case is decided sufficiently appear in the opinion of the court.

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A. J. Parker and *D. L. Seymour*, for the plaintiffs, (appellants.)

W. A. Beach, for the defendants, (respondents.)

By the Court, HOGBOOM, J. The premises sought to be recovered in this action embrace land partly on the south bank of the Wynantskill and partly in the bed of the stream, covered by a dock erected by the defendants. The defendants, at the trial, relied, among other things, on the defense of adverse possession. And this defense was sought to be maintained by evidence of actual adverse possession, limited mainly, if not exclusively, to the land on the shore, and not embracing the land under water. The court, among other things, charged the jury that if the defense of adverse possession was maintained as to the premises in dispute, comprising the south bank of the stream, the plaintiffs could not recover for the bed of the stream south of the center line and opposite to the premises so held adversely; and that notwithstanding the plaintiffs might have shown a good paper title to the entire premises in dispute, yet if the defendants had proved that they had occupied the south bank at the point in question adversely, so long as to establish a defense as to such bank, it would give to the defendants the right to hold to the center of the stream, and would defeat this action, as to the bed of the stream. To each portion of this charge the plaintiffs duly excepted. The effect of it was to declare that an adverse possession of the land on and adjacent to the bank of a stream of water for a sufficient time to mature a title, would be carried, constructively and by operation of law, to the center of the stream, without any actual adverse occupancy of the land under water in the stream itself. In this I think the judge at the circuit erred. It was something more than charging that a riparian proprietor, confessedly in the actual and notorious occupancy of lands upon the shore of a stream of water, might not be obliged to

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establish his occupancy of the bed of the stream by evidence of acts of possession as plain, palpable, notorious, exclusive and frequent as those relating to the land not under water. It was a charge that by operation of law occupancy of the bank not only presumptively but necessarily was occupancy to the center of the stream. I think this was going too far; for it is quite possible to conceive that while one party was actually occupying the land on the bank, his neighbor and adversary might be in the actual and hostile possession of the land under water in the bed of the stream directly adjacent thereto. (*Townsend v. McDonald*, 12 N. Y. Rep. 381. *Olmsted v. Loomis*, 9 id. 423.) Independent of this, there are several reasons why adverse possession should not be permitted to prevail beyond the limits of the actual possession. In the first place, the statute says so. The adverse possession, if founded upon a written instrument, is limited to four cases, the 3d and 4th of which have no bearing on the present question. The 1st and 2d cases are as follows: "1. Where it (the land) has been usually cultivated or improved; 2. Where it has been protected by a substantial inclosure." (3 R. S. 503, § 83, 5th ed.) The two succeeding sections are as follows: "Sec. 84. Where it shall appear that there has been an *actual continued* occupation of premises under a claim of title, exclusive of any other right, but not founded upon a written instrument, or a judgment or decree, the premises *so actually occupied, and no other*, shall be deemed to have been held adversely. Sec. 85. For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument, or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases only: 1. Where it has been protected by a substantial enclosure: 2. Where it has been usually cultivated or improved." These citations are from the code of procedure; but the previous statute was in substance the same, and in language nearly identical. (2 R. S. 294, §§ 10, 11, 12.) In the next place the decisions are,

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that the possession must be marked by distinct boundaries. (*Brandt v. Ogden*, 1 *John*. 156. *Jackson v. Waters*, 12 *id.* 365. *Jackson v. Warford*, 7 *Wend.* 62. *Jackson v. Halstead*, 5 *Cowen*, 216.) Again, if actual occupancy of the bank is constructive, and prima facie sufficient, occupancy to the center of the stream, it will be seen that serious difficulties might arise in determining the question of title. Suppose the deed and the actual paper title of the opposite riparian proprietor on the north carries him to the shore on the south; may he maintain ejectment for the land under water south of the center of the stream, against the adverse possessor of the south bank? Would not the latter be permitted to say, I have not encroached upon you; I had a perfect right to the bank, and that is as far as I have actually occupied or claimed. It seems to me that the test must be (where there is no conflict of paper title) *actual* occupancy measured by a distinct, visible and marked, and not by a presumptive or constructive, possession. I think this view is not effectively answered by the argument that adverse possession presumes a grant, and a grant must be presumed to extend to the center of the stream. If an adverse possession is founded upon the idea of a *grant*, which I do not admit, and which, if countenanced by the earlier cases, ought, I think, to be repudiated because it is at known variance with the actual truth, the grant must, I think, be presumed to be *only coextensive* with the actual limits of the adverse possession—a grant with boundaries corresponding with the exterior lines of the actual possession. Such a description, in a grant, would not carry the land to the center of the stream, but only to the shore; for it is undeniable that a deed bounded expressly upon the line of the shore would altogether exclude the land under water. The reason why a deed bounded generally upon a stream of water carries you to the center is, that the stream thus defined is supposed to be a *line* without width, in the center of the stream, and not a *space* having width and extent as appearing upon the face of the earth.

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It is because the deed itself, as properly read and construed, by the force of its terms bounds the land by the center line, and not by the shore line of the stream. (*Hammond v. McLachlan*, 1 *Sand. S. C. R.* 323. *Herring v. Fisher*, 1 *id.* 344. *Adams v. Rivers*, 11 *Barb.* 390. *Demeyer v. Legg*, 18 *id.* 14. *Jackson v. Hathaway*, 15 *John.* 447. *Hooker v. Utica & Minden Co.*, 12 *Wend.* 371. *Imlay v. Union Branch R. R. Co.*, 26 *Conn. R.* 249. 3 *Kent's Com.* 433.) If these views are correct, the judge at the circuit committed a material error in his charge to the jury, and one which we are not at liberty to disregard; for it may have had a vital bearing upon the verdict. And it is one which must result in a new trial, however much we may regret that a cause apparently so sharply litigated and closely tried should be remanded.

The disposition of this question makes it unnecessary to examine several other serious and interesting questions which present themselves in the case.

The judgment of the circuit court must be reversed, and a new trial granted, with costs to abide the event.

[ALBANY GENERAL TERM, March 4, 1861. *Gould, Hogeboom and Peckham, Justices.*]

BROWN vs. PETER BROWN, executor, &c. of Marcus Brown,
deceased.

Where a contract is not, of itself and on its face, necessarily illegal and void, the legal presumption is in favor of its validity. But it is only a presumption, and not a conclusive inference.

When a contract is ambiguous, on its face, and it may cover either a legal or an illegal consideration, parol evidence is admissible to determine the intentions of the parties.

Hence, in an action upon a contract for personal services, ambiguous in its terms, parol evidence is admissible, to show what services the parties intended should be performed. This may be shown in a variety of ways; among others, 1. By the declarations and admissions of the parties. 2. By

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their acts and proceedings under the contract, giving it a practical construction.

The fact that one of the parties is dead, furnishes no sound reason for not receiving evidence of the intent of the other party, as manifested by his declarations.

A contract for procuring papers, for furnishing information or memoranda, for producing evidence, and for making arguments before the legislature or a committee of that body, in regard to matters of legislative cognizance properly before them, is legal and valid.

But a contract for lobby services, for personal influence, for mere importunities to members of the legislature or other official body, for bribery or corruption, or for seducing or influencing them by any other arguments, persuasions or inducements than such as directly and legitimately bear upon the merits of the pending application, is illegal and against public policy, and void.

Where an agreement is one and entire, if illegal and void in one particular, the illegality penetrates and corrupts the whole agreement, and vitiates it altogether.

In an action upon a contract for personal services, which is held to be illegal and void, the plaintiff cannot recover under the *quantum meruit*, for such of the services rendered as were lawful in their character and not against public policy; where there is no distinct evidence of their value, and they are blended together, and have not been in any way separated or disconnected from the illegal services, and are not in fact capable of such severance or disconnection.

APPEAL from a judgment entered on the report of a referee. On the 25th day of July, 1845, the testator entered into a written agreement with the plaintiff and Thomas Machin, to pay to them one half of all moneys that might be granted by law or procured by an act of the legislature of the state of New York passing on the claim of Conradt Brown, deceased, who by his last will and testament devised and bequeathed to his son Marcus (the testator) a certain amount of property taken from him by Col. Willett in the revolutionary war, "on the condition that they (plaintiff and Machin) do *obtain a grant* from the legislature, allowing me (testator) pay for the property taken by order of Col. Willett, as above stated, at their own expense, and to save me from all expenses that may accrue hereafter; and I do agree to furnish such papers, and execute any papers that may be

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required, to enable them to obtain the said grant, hereby binding myself, and my heirs, to fulfill the same. Given under my hand this 25th day of July, 1845. MARCUS BROWN."

Under this agreement the plaintiff and Machin proceeded to act. They appeared before the legislature and committees of that body, and individual members thereof, from time to time, in several different years. They procured necessary papers; they furnished evidence and information; they argued the matter to individuals and committees; they importuned members; they exercised their individual influence; they procured and employed others to exercise theirs; and they operated in various other ways to bring about the desired object. Ultimately, in 1857, a law was passed by the legislature authorizing the payment to Marcus Brown, upon this claim, of the sum of \$1545.98. Of this sum Machin received one-fourth, \$386.49, and the residue was paid to the defendant's testator. The plaintiff demanded of him a like sum, \$386.49, which was refused to be paid, and this action was brought to recover the same. Marcus Brown died on the 20th of June, 1857. The cause was referred to a referee, who reported, among other things, that the plaintiff and Machin rendered such services as are before mentioned; that "these efforts, or those of a similar nature, were continued from year to year until an act was passed, April 7, 1857, for the relief of Marcus Brown, (*Laws of 1857, ch. 761*;) that from the date of said instrument until the final passage of said act, the plaintiff and said Machin expended money from time to time in endeavoring to procure the passage of the law, but by far the greatest portion of their expenditures to that end, so far as appears by the evidence, was in procuring others to use their personal influence with members of the legislature, in order to secure its passage." And he found, among other conclusions of law, "that the instrument upon which this action is founded is void on its face, being conditioned to procure the enactment of a private statute, and providing, in its spirit and intent, for the performance of lobby services; that

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the plaintiff and Machin did not obtain the passage of the act, except in such manner and by such means as were illegal and contrary to public policy ; that the legal services were so intermingled with the immoral and illegal services rendered by them, that the performance of the condition of said instrument, and the whole service, became so tainted, that the courts ought not to lend their aid in declaring the performance sufficient to maintain the action. The plaintiff having excepted to the report, judgment was perfected for the defendant, and the plaintiff appealed.

Lyman Tremain, for the plaintiff, (appellant.)

James E. Dewey, for the defendant, (respondent.)

By the Court, HOGEBOM, J. The contract sued on is not of itself and on its face necessarily illegal and void. In such case the legal presumption is in favor of its validity. But it is only a presumption, and not a conclusive inference. On its face the contract is ambiguous. It may cover a *legal* or an *illegal* consideration. It is susceptible of either construction.

In such case parol evidence is admissible to determine the intentions of the parties, as to the nature and character of the services to be rendered. This does not violate the rule that a written instrument cannot be contradicted by parol. The object of the evidence is not to contradict the instrument, but to apply it to the objects intended. The evidence is of a suppletory character, and is always admissible. The circumstances and situation of the parties, so far as they bear upon the effect of the contract, may always be proved, to give it application and effect. There probably never was a written instrument in the world which did not require some extrinsic evidence to give it application. (*Phelps v. Bostwick*, 22 Barb. 314, 317. *Cole v. Wendel*, 8 John. 116. *Waldron v. Willard*, 17 N. Y. Rep. 468. *Davison v. Seymour*, 1

Bosw. 94. *Perkins v. Goodman*, 21 *Barb.* 218. *Sheldon v. Peck*, 13 *id.* 317. *Agawam Bank v. Strever*, 18 *N. Y. Rep.* 508. 2 *Parsons on Contracts*, 2d ed. 76.)

Parol evidence was therefore admissible to show what services the parties intended should be performed in obtaining the grant from the legislature. This may be shown in a variety of ways; and among others, 1. By the declarations and admissions of the parties. 2. By their acts and proceedings under the contract, giving it a practical construction.

That the defendants' testator is dead, furnishes no sound reason for not taking evidence of the intent of the other party—the plaintiff—who is the claimant and prosecutor, which would be conclusive or at least operative against him. His declarations were therefore admissible.

A contract for procuring papers, for furnishing information or memoranda, for producing evidence, for making arguments, before the legislature or a committee of that body, in regard to matters of legislative cognizance properly before them, is legal and valid. (*Sedgwick v. Stanton*, 14 *N. Y. Rep.* 289. *Jenkins v. Hooker*, 19 *Barb.* 435.)

A contract for lobby services, for personal influence, for mere importunities to members of the legislature, or other official body, for bribery or corruption, or for seducing or influencing them by any other arguments, persuasions or inducements than such as directly and legitimately bear upon the merits of the pending application, is illegal and against public policy and void. (*Sedgwick v. Stanton*, 14 *N. Y. Rep.* 289. *Harris v. Roof*, 10 *Barb.* 493. *Gray v. Hook*, 4 *Comst.* 456. *Marshall v. Balt. and Ohio R. R. Co.*, 16 *How. (U. S.) Rep.* 314, 334. *Davison v. Seymour*, 1 *Bosw.* 89, 94. *Fuller v. Duane*, 18 *Pick.* 481.)

The referee has found, upon sufficient evidence, that the contract in question was illegal and void. His finding that upon its face it is so, may not be correct, unless taken in connection with the evidence which gives it point and application. But his finding that it originated in a corrupt purpose, and

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had an illegal object, is borne out by the evidence; at least sufficiently so to prevent its being set aside for that reason.

The services in question were intended to be and were rendered under this contract, and therefore compensation for them is not recoverable in this action. The contract is one and entire; it cannot be partly legal and partly illegal. The illegality penetrates and corrupts the whole contract, and vitiates it altogether. This is a necessary consequence of the unity and entirety of the contract. (*Brown v. Treat*, 1 *Hill*, 225. *Suydam v. Smith*, 7 *id.* 182. *Miller v. Scherder*, 2 *Comst.* 262. *Lambert v. Snow*, 17 *How.* 517. *McGovern v. Payn*, 32 *Barb.* 91.)

Nor can the plaintiff, I think, under the evidence and in the aspect which the case presents, recover under the *quantum meruit*, for such of the services rendered as were lawful in their character and not against public policy; for 1. There is no distinct evidence of their value; they have not been in any way appraised. They were not sought to be recovered under a *quantum meruit*. 2. They have not been in any way separated or disconnected from the illegal services. They were all performed together, or in common. The referee declares his inability to discriminate between them. 3. They were not in fact capable of such severance or disconnection. They were blended together. They were sometimes parcel of the same act. They probably sprang from the same vicious fountain. There is no means of disentangling them. (*Rose v. Truax*, 21 *Barb.* 361.)

As my opinion is adverse to the plaintiff upon the merits of the case, it is unnecessary to examine the question whether the non-joinder of Machin with Brown as a co-plaintiff, presented a valid objection to the plaintiff's recovery.

The judgment entered upon the report of the referee should be *affirmed*.

MARY CHAMPNEY vs. DAVID COOPE, executor, &c. and
others.

Payment of a bond and mortgage extinguishes it. If the payment be of the whole amount secured by the instrument, it extinguishes the same altogether; if of only a part, it extinguishes it *pro tanto*.

There is no exception to this rule, as between the debtor and the creditor, although the security may sometimes, for equitable purposes, be kept alive as between the principal debtor and his surety, where the payment has been made by the latter.

Whether a sum of money received by the creditor, upon the bond and mortgage, amounts to a payment, depends, ordinarily, upon the intent of the party paying or advancing the same.

If intended and declared to apply on the instrument, at the time, and so received, at the time, in total or partial satisfaction thereof, it has that effect; and no subsequent change of intent by the debtor can retroact, or renew the security, without the consent of the parties interested, and without prejudice to third persons.

Where a mortgage is executed by A. for the benefit of B., the latter is the real debtor, and a payment made by him is equivalent, in its effect upon the bond and mortgage, to a payment by A. It will be deemed a payment for the benefit of A. and by his direction; and as far as it goes, is an extinguishment of the mortgage.

Under such circumstances, the death of A. will terminate whatever agency there may be in B. It will not be presumed that after that event B. had any authority from A. to negotiate the mortgage, or to make any representations as to the validity and sufficiency thereof, which will bind or estop A.

Nor will the fact that B. is the executor of A.'s will, give him authority to make such representations; it not being an act for the benefit of the estate.

Where the plaintiff took from B. a bond and mortgage thus made by A. for B.'s benefit, with an assignment thereof executed by the mortgagee, in part payment of a precedent debt; with knowledge that the bond and mortgage were long overdue; that A., the mortgager, was dead; that B., as executor of A., had no power to mortgage; that he was embarrassed in his circumstances, and was endeavoring to secure the plaintiff's debt by means of securities which he did not own, and the very possession of which, by him, was some evidence that they were paid; it was *held* that the plaintiff did not present herself with any special equities against A., and could not enforce the mortgage against A.'s estate.

The payment by a debtor, of the amount due upon a bond and mortgage, will operate as a satisfaction, notwithstanding such payment be accompanied by a stipulation and an intent to have the instrument subsequently assigned and kept on foot as valid securities.

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THIS action was brought to foreclose a mortgage executed by Jane Coope, (now deceased,) to Jane T. James, as trustee for Mrs. Elizabeth Owen, on lands in Ulster county, dated 13th July, 1844, conditioned to secure the payment of \$5000 four years from date, and interest at six per cent. On the 20th March, 1856, the defendant David Coope delivered to the plaintiff the above mortgage and the bond to which it was collateral, with an assignment thereof, executed by the mortgagee, and dated and acknowledged on the 1st February, 1856, and received from her a writing dated the 20th March, 1856, declaring the conditions on which she received the bond and mortgage, viz. to secure notes made by David Coope, then held by her, and such other notes made by him as she might thereafter hold, and to reassign the same to him, or his appointee, after payment of all such notes.

Jane Coope died in the spring of 1849. The evidence shows, and the referee finds, that she made the mortgage to accommodate David Coope, who received from the mortgagee the money secured by it, and who then agreed with the mortgagor to pay off the mortgage debt. He at the same time signed and sealed a guaranty, written upon the bond, and of the same date, that the debt should be paid according to its condition. The evidence shows, and the referee also finds, that David Coope paid all the accruing interest on the bond and mortgage, until their assignment to the plaintiff; and that he paid or advanced to the mortgagee, on account of the principal thereof, the sum of \$5000, as follows: On the 1st of May, 1850, \$1000; on the 13th of January, 1855, \$200. That he also paid or advanced to the sons of the mortgagee on the 4th of October, 1855, \$1000, and gave to the sons of the mortgagee, with her assent, on account of the balance of said principal sum, four promissory notes for the aggregate sum of \$2800; all of which matured on or before the 7th day of February, 1856, which were paid by him at maturity. At the time of the receipt of said last mentioned \$1000 and said notes for \$2800, the said sons of the mortgagee, with

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her assent, gave to him a receipt for the same, stating that it was the amount, in full, due on said bond and mortgage, and that \$1200 had been previously paid ; and they agreed to assign or cause to be assigned said bond and mortgage to such persons as he should name, and place the same in escrow in the hands of Samuel Smith, to be retained by him until said notes above described were paid, or until they authorized him, by writing, to deliver up said bond and mortgage to Mr. Coope. When the two previous sums of \$1000 and \$200 were paid, nothing appears to have been said or done to rebut the inference that they were intended as absolute payments upon the bond and mortgage.

The evidence shows that the plaintiff had been in the habit for many years of depositing money with David Coope, on which he allowed her interest, and on which she drew at pleasure. When the bond and mortgage were delivered to her, (20th March, 1856,) her name was filled in the blank left for the name of an assignee in the assignment. The balance then due her from David Coope was about \$1800 on deposits made by her, beginning 1st December, 1854. Between the 19th September, 1855, and the 16th February, 1856, she had so deposited only \$200, and had during the same period drawn \$200. Subsequent to the 20th March, 1856, the plaintiff loaned David Coope such additional sums as carried his indebtedness to her up to the principal sum secured by the mortgage and which is still unpaid.

By her last will the mortgagor devised the premises in question to her daughter Mary for life, remainder to her daughter's children. The daughter died before the commencement of this action, and a guardian *ad litem* was appointed for such of her children as were infants. Said children, together with David Coope and Albert Carpenter, executors of the last will and testament of Jane Coope, deceased, are the defendants in the action.

In the summer or fall of 1855, (the referee finds,) the defendant David Coope stated to the plaintiff that he would

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cause the said mortgage to be assigned to her, as a security for all the money she had loaned him or should loan him, and also stated to her that the same was a good security; and that the several moneys thereafter loaned to the said David Coope, by the plaintiff, were loaned upon the faith of the said statement. The referee further finds that the said defendant David Coope did not intend, by the *said payment*, (probably alluding to the payment of the 4th of October, 1855,) to satisfy or extinguish the said bond and mortgage, but made the said payment with the intention of keeping the said bond and mortgage alive and outstanding, and of transferring them to the plaintiff as valid and outstanding securities; and that he did transfer, or cause them to be transferred, to the plaintiff accordingly; and that before or at the time the plaintiff took the assignment, she had no knowledge or notice that David Coope occupied any other relation to the mortgagor than that of surety or guarantor upon the said bond; or that he had received the moneys originally loaned on the said bond and mortgage, or had agreed to pay the same; or that the said bond and mortgage were paid, satisfied or extinguished. And he finds that she received the said assignment in good faith, and in the full belief that the said bond and mortgage were unsatisfied, and were good and available securities, and could be lawfully assigned to and received by her as such. But it also sufficiently appears from the evidence that the plaintiff, at and before the time when she received from David Coope the assignment of the bond and mortgage, knew, 1. That they had been due for upwards of eight years. 2. That the mortgagor was dead, and that David Coope was her executor, and that her will gave no power to mortgage. 3. That several months before, the mortgagee had required the debt to be paid, and that David Coope was embarrassed to raise money to pay it, and that he was in circumstances of pecuniary difficulty. 4. That the money due to her was his debt, and that the money she was about to loan to him was for his individual use and benefit.

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The referee held that the bond and mortgage were not satisfied or extinguished, but were outstanding, subsisting and valid securities; were the property of the plaintiff, and that there was due thereon \$5000, with interest from the 1st day of July, 1858. The defendants excepted to the report. The usual judgment for a foreclosure and sale of the mortgaged premises having been entered, the executors of the mortgagor, and the grandchildren who take under the will, appealed to the general term.

J. M. Van Cott and *W. B. Ackley*, for the defendants, (appellants.)

A. J. Parker, for the plaintiff, (respondent.)

By the Court, HOGBOOM, J. Payment of a bond and mortgage extinguishes it. If the payment be of the whole amount secured by the instrument, it extinguishes it altogether; if of only a part, it extinguishes it *pro tanto*. I know of no exception to this rule as between the debtor and the creditor, although the security may sometimes, for equitable purposes, be kept alive as between the principal debtor and his surety, where the payment has been made by the latter. (*Cameron v. Irwin*, 5 Hill, 272, 276. *Wood v. Colvin*, 2 id. 566. *Fitch v. Cotheal*, 2 Sandf. Ch. 29. *James v. Morey*, 2 Cowen, 246.)

Whether a sum of money received by the creditor, upon the bond and mortgage, amounts to a payment, depends ordinarily upon the intent of the party paying or advancing the same. If intended and declared to apply on the instrument at the time, and so received at the time, in total or partial satisfaction thereof, it has that effect; and no subsequent change of intent by the debtor can *retroact* or renew the security, without the consent of the parties interested, and without prejudice to third persons. (*Truscott v. King*, 2 Seld. 147. *Mead v. York*, Id. 449. *Marvin v. Vedder*, 5 Cowen, 671.)

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t has been held, however, that if the payment be made by the debtor himself, no intent on his part, though existing at the time, to have it operate otherwise than as a satisfaction, will be permitted to have effect. If he supplies the money, and it is applied upon the instrument, though with the intent to have it subsequently assigned and continued as a valid security, such intent, it is held, is unavailing, and incapable of being effectuated. (*Harbeck v. Vanderbilt*, 20 *N. Y. Rep.* 395.)

In this case a payment by David Coope is equivalent, in its effect upon the bond and mortgage, to a payment by Jane Coope. David Coope was the real debtor. A payment by him is a payment by Jane Coope. If she had paid the debt, in whole or in part, there can be no doubt it would have been so far extinguished. If he paid, as he was in fact, as between them, bound to pay, it must be deemed a payment for her benefit and by her direction, and to its extent was an extinguishment of the mortgage. As I have before stated, the rule is universal, except as between principal and surety; and here no question arises between them, for they both desire and claim the extinguishment of the mortgage.

I do not think that under the circumstances the plaintiff can claim that David Coope was the agent of Jane Coope, and that his representations as to the validity and sufficiency of the mortgage bind or estop Jane Coope. Jane Coope had died in the spring of 1849, and this fact was known to the plaintiff. Her death terminated the agency, if one there was. It could not be presumed that after that period he had any authority from her to negotiate the mortgage or make representations in regard thereto. (*Megary v. Funtis*, 5 *Sand.* 376.) Nor do I think his *executorship* of the will of Jane Coope gave him such authority. It was not in the line of his duty, express or implied. It was not an act for the benefit of the estate of Jane Coope, but the contrary. He did not hold the mortgage as a representative of the estate; nor in that capacity was he qualified in any respect to transfer

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it. So far as it affected the estate of Jane Coope, it affected, primarily at least, her real estate, which was devised not to him but to the children of his sister, Mary Carpenter—and he is not pretended to have been *their* agent. He had no title under the will, whatever. I see nothing, therefore, in his situation, to make his representations obligatory upon Jane Coope's estate.

On the contrary, his very possession of the bond and mortgage was a circumstance of some suspicion, tending to discredit his authority for negotiating the same. He was not the mortgagee, nor the assignee of the mortgagee. He was the debtor—the actual debtor, in fact; and if not known to the plaintiff to be the principal debtor, still known to her by his guaranty on the bond, to be one of the debtors—one of the parties bound to pay. The possession of the bond and mortgage by him, was some evidence that it was paid. In other respects, whatever may be her equities as against David Coope, she does not present herself with any special equities against Jane Coope. She took the mortgage, in part, at least, for a precedent debt; with knowledge that it was long overdue; that the mortgagor was dead; that David, as executor, had no power to mortgage; that he was himself considerably embarrassed, and was employing this mode of redeeming his promise to secure her debt, by means of a mortgage which he did not own, and the very possession of which, by him, was calculated to inspire doubt whether it continued to be a valid and subsisting security.

As to the first payments, of \$1000 and \$200, the report cannot be sustained. The payment was absolute and unqualified, and the bond and mortgage were *pro tanto* extinguished. Jane Coope never in any way consented to its resuscitation, and the representations of David Coope to the plaintiff, six or seven years after her death, could have no effect as against her or her estate.

As to the balance of \$3800, there is more difficulty. It is very apparent that David Coope did not, when he paid the

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\$1000 on the 4th of October, 1855, and gave his notes for the \$2800, intend to extinguish the bond and mortgage. On the contrary, the proof is quite satisfactory that he intended to keep it alive. He designed to have it assigned to some third person. And it is quite clear that until the notes were paid, in February, 1856, it remained a valid security, at least for the \$2800 in the hands of Mrs. Owen. The notes were not received in absolute payment.

And yet, on the 4th of October, 1855, \$1000 was in *fact paid* by the real debtor, David Coope, and by the 7th of February, 1856, the remaining \$2800 was also paid. It was paid from the funds of David Coope—the real debtor—who had no right, especially as he stood in a trust relation to the estate of Mrs. Coope, to keep up an incumbrance against her estate after it was in fact extinguished. He was paid without any distinct understanding—indeed, without any understanding—that the money was to remain as a deposit. Could the mortgagee, after the final receipt of the money, have foreclosed the mortgage? Could David Coope, to whom, pursuant to a stipulation in the paper of October 4th, 1855, the bond and mortgage were delivered up, (as if paid,) on the payment of the notes, have foreclosed the same, or enforced them as a subsisting security against the estate of Mrs. Coope? It is true, Mrs. Owen agreed to assign them to whomsoever David Coope should name; but that is consistent with the idea that he anticipated the money might be advanced to the mortgagee by some one else than himself. And if this stipulation referred to the case of money advanced by himself, it has been adjudged that a payment by a party himself, though accompanied with a stipulation and an intent to assign, is ineffectual to keep up the mortgage as a subsisting and valid security. (*Harbeck v. Vanderbilt*, 20 N. Y. Rep. 395.)

I am inclined to think that, assuming all the *facts* in the case to be as the referee has found them, and all others which are deducible from the evidence, the plaintiff cannot sustain

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her action; and that no possible state of the proof can be presented, which, upon the undisputed facts of the case, will entitle the plaintiff to recover.

If this be so, it seems to be almost useless to subject the parties to the expense of any farther litigation; and perhaps it would not be inappropriate for us to reverse the judgment of the special term, and to dismiss the plaintiff's complaint, with costs.

But perhaps it is more judicious to give the plaintiff an opportunity to put the facts in a more favorable aspect to her claim, and to bring forward further evidence, if she is able to do so. I am inclined, on the whole, to give her this opportunity, and with that view to reverse the judgment of the special term, and to order a new trial, with costs to abide the event; which costs may be finally disposed of, as equity shall require.

New trial granted.

[ALBANY GENERAL TERM, March 4, 1861. *Gould, Hogeboom and Peckham*, Justices.]

 RELYEA vs. BEAVER.

In an action brought since the code, for trespass on lands, the plaintiff, after having proved acts of trespass committed within the period laid in the complaint, may give evidence of additional acts, committed prior to the earliest day stated in the complaint.

The old rule ought not to be enforced, under the code; but the decision should turn upon the materiality of the variance from the allegations in the complaint, and upon the question whether the opposite party has been misled, or will be prejudiced, by the admission of the testimony.

An action of trespass, under the statute, may be maintained by one adjoining proprietor of lands, against another, to recover treble damages for cutting trees standing on the line between the lands of the parties

And, in a case of sufficient importance, *it seems* such cutting of line trees may be restrained by injunction.

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THIS is an action brought by the plaintiff against the defendant, claiming to recover treble damages, under the statute, against the defendant, for entering upon the plaintiff's land and cutting down and carrying off trees, timber, &c., contrary to the provisions of the statute, &c., entitled *Of trespass on lands, &c.*

It appears from the case, that the plaintiff and defendant owned adjoining farms; at the place where the trees were cut the plaintiff's lands were woods, the defendant's were cleared and fenced up to the line. In the line of the fence were trees or stumps of trees, including one large oak stump, which were claimed to be line trees, and had been cut by the defendant, at or about the time he built the fence, and which was built entirely by him. The plaintiff complained of acts of alleged trespasses committed at divers times between the first of September, 1858, and the commencement of the suit. A verdict was rendered for the plaintiff for \$25. Various exceptions were taken on the trial, and to the judge's charge, and a motion was now made for a new trial. The cause was tried before Justice GOULD, on the 1st day of June, 1860, and the exceptions were ordered to be heard in the first instance at the general term.

The plaintiff having proved, without objection, several acts of trespass within the period laid in the complaint, offered to prove additional acts of trespass committed prior to the earliest day stated in the complaint. The defendant objected to the evidence, on the ground of their being prior to the time laid in the complaint. The objection was overruled, and the evidence admitted, and the defendant excepted.

Evidence was given in the case tending to show that some of the trespasses consisted in the cutting of line trees; that is, of trees standing on the line between the lands of the plaintiff and the lands of the defendant, and intersected by such line. In regard to these trespasses, "the counsel for the defendant asked the court to charge the jury that the plaintiff is not entitled to recover in this action, against the de-

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fendant, for the cutting of line trees by the defendant. But the court refused so to charge, and directed the jury that if they found the defendant had cut line trees, they would find therefor, in favor of the plaintiff, the value of such proportion of the trees as was on the plaintiff's land. To which refusal and ruling the counsel for the defendant excepted."

T. B. Gates, for the plaintiff.

A. J. Parker, for the defendant.

By the Court, HOGEBOM, J. The evidence of trespasses committed anterior to the day named in the complaint was, I think, properly admitted. The old rule was in the highest degree technical and without much foundation in reason. That rule, where the trespasses were laid with a continuance, forbade the introduction of evidence of trespasses, unless committed within the space of time laid in the declaration; provided acts of trespass within that period had been already proved. But if they had not been, then it was allowable to give evidence of an act of trespass earlier than the first day named in the declaration. (1 *Ch. Pl.* 273, 7th ed.)

I think that rule, so far as it rests upon the technical foundation above mentioned, ought not to be enforced under the code—at least as a rule of unbending rigor. But that the decision should turn upon the materiality of the variance from the allegation in the complaint, and the question whether the opposite party has been misled or will be prejudiced by the admission of the testimony. No pretense of that kind was made on the trial; still less was it established by affidavit. I think the judge therefore was right in disregarding the variance as immaterial; especially as he would have been justified in amending the complaint on the spot, without satisfactory evidence that it was likely to injure the adverse party. (*Code*, §§ 169, 170.)

The more interesting question in the case is, was his charge

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right in regard to the line trees; or, to put it in another shape, were the plaintiff and the defendant *tenants in common* of the line trees.

It is not pretended that these line trees were the result of the combined labor or purchase of the adjoining owners, or of their predecessors in the title, or of the purchase of the undivided interests therein of any other parties, or of any of the ordinary modes of acquiring title, by which a tenancy in common was created.

Ordinarily, the established boundary line between adjoining owners of land is the true and only test to determine the title to the land on either side and of all below and above it, from the center of the earth to the heavens. I do not know that there is any exception to the rule in regard to the earth or its natural productions. The growth from the soil, whether it be the grass and herbage, the plants and bushes, or the more lordly trees, must, I think, share the same fate, and belong to the person on whose soil they grow. If they grow partly on the soil of one, and partly on the soil of another, I do not see that the rule is altered. The portion that grows on the land of each must belong separately to him, and not partly to him and partly to his neighbor. The essence of a tenancy in common is a joint interest in each and every part, and it is difficult to see upon what principle this, as applicable to line trees, can be founded. It is conceded not to be the rule in regard to artificial objects placed upon the line by the hand of man—such as a *wall*, a *fence*, a *house*, or a building of any description. These are supposed to be erected with a knowledge that the title thereto must follow the land upon which they stand, unless there be some consent to a different rule. And hence, unless there be some express or implied consent to their erection, they may, *in general*, be removed, so far as they encroach, though such removal be attended with loss or injury to the other party, or even the entire destruction of the artificial erection. Where there is a stipula-

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tion between the parties, of course a very different rule may prevail.

If this be the rule in regard to artificial erections, why is it not equally so in regard to natural objects? Is there any difference in principle? Must they not both be governed by the controlling principle *cujus est solum, ejus est usque ad cælum*. It appears to have been decided in *Waterman v. Soper*, (1 Lord Raym. 737,) that "If A. plants a tree upon the *extremest limit* of his land, and the tree growing extends its root into the land of B. next adjoining, A. and B. are tenants in common of the tree. But if all the root grows in the land of A., though the bows overshadow the land of B., yet the branches follow the root and the property of the whole is in A." I do not agree to the proposition contained in the first sentence of the foregoing extract, and I do not think it is law. It is not, as has been supposed, supported by the decision in the case of *Lyman v. Hale*, (11 Conn. R. 177.) The head note of that case is as follows: "If a tree, the trunk of which stands on the land of A., extends some of its branches over and some of its roots into the land of B., A. and B. are not joint owners or tenants in common of such tree; but it is, with such overhanging branches and the fruit thereof, the sole property of A.; and if B. gather the fruit from such overhanging branches and appropriate it to his own use, he is liable, in trespass, to A." So also in *Beardslee v. French*, (7 Conn. R. 125,) it was held that where the trunk of a tree was upon the land of A. and some of the branches and fruit overhang the land of B., the latter do not belong to B. In *Masters v. Pollie*, (2 Rolle, 141,) it was decided that where a tree grows in A.'s close, though the roots grow in B.'s, yet the body of the tree being in A.'s soil the tree belongs to him. This doctrine was approved by Littledale, J., in *Holder v. Coates*, (1 Moo. & Malk. 112; 22 Serg. & Lowb. 264.) See also 1 Ch. Gen. Pr. 652; 20 Vin. Abr. 417; *Griffin v. Bixbey*, (12 N. H. Rep. 454.)

It is not a valid argument against the application of this

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rule that it might lead to the wanton destruction of valuable timber, or fruit, shade, or ornamental trees. The answer is, it is not necessarily attended with such a consequence. It does not inevitably follow that a tree may be cut down or split in two, or half of it virtually removed, because so much of it is on the land of the party doing the act. In case of serious injury, the maxim applies *sic utere tuo ut alienum non lædas*. There are many cases where this applies. A man is not allowed to have a nuisance upon his own land if he thereby injures or annoys his neighbor. (*Aldred's case*, 9 Coke, 58.) He is not allowed to blast rocks on his own land and throw them thereby on the land of his neighbor. (*Hay v. Cohoes Co.*, 2 Comst. 159. *Tremain v. Cohoes Co.*, *Id.* 163.) He may not obstruct ancient lights. (*Pickard v. Collins*, 23 Barb. 444.) He cannot lawfully displace a party wall. (*Eno v. Del Vecchio*, 4 Duer, 53.) He cannot dig in the bed of a stream on his own side of the center, in such a way as to divert the natural flow of the water. (*Van Hoesen v. Coventry*, 10 Barb. 518.) He cannot dig away the earth on his own land where it is essential to the natural, lateral or subjacent support of the land of his neighbor. (*Farrand v. Marshall*, 19 Barb. 380 ; *S. C.* 21 *id.* 409. *Humphries v. Brogden*, 1 Eng. Law and Eq. Rep. 241.) So, I apprehend, a line tree in many cases cannot be cut and destroyed : 1. Because it is a line tree, and therefore necessary to be preserved as a natural monument. 2. Because the cutting or destruction of one part will or may result in the destruction of the other part. The act seems a totally unnecessary and wanton one, and if it be so in fact, is justly punished by treble damages, and I have no doubt, in a proper and sufficiently important case, may be restrained by injunction.

I am therefore of opinion that no error was committed by the learned judge on the trial, on either of the points to which exception was taken ; and that a new trial should be *denied*.

[ALBANY GENERAL TERM, March 4, 1861. *Gould, Hogeboom and Peckham, Justices.*]

THE ARTISANS' BANK *vs.* WILLIAM B. TREADWELL, JOHN G. TREADWELL, JOHN S. PERRY and EDWARD NORTON.

JOHN G. TREADWELL *vs.* WILLIAM B. TREADWELL, JOHN S. PERRY, EDWARD NORTON and JOHN F. RATHBONE.

Where it appears, from the opinion of the judge, that an order denying an application at a special term, was not made for merely *discretionary* reasons, it is the subject of appeal, and liable to be reversed, if erroneously made.

Where a judge, at special term, denied an application made by the plaintiff in a judgment recovered against a special partnership, that the receiver should pay the amount of such judgment out of funds of the partnership in his hands. on two grounds: 1. That the judgment and execution could not by law take preference over the demands of the general creditors of the partnership; and, 2. That the receiver's rights took effect, by relation back to the commencement of the action in which he was appointed, which was prior to the plaintiff's lien by execution; *Held* that the decision, upon either of these grounds, was a decision upon the *merits* of the application.

An order denying to the plaintiffs the exclusive right to a large sum of money may be appropriately said to affect a substantial right, and is therefore appealable.

Wherever funds converted into cash are held by a sheriff, receiver, or other officer or trustee, any one of the claimants of such fund may make a motion, upon notice to the other parties interested and to the officer holding the funds, for an order directing their payment to him.

A judgment is not irregular though not signed by the clerk; at least not void; so as to enable a third person to object to its invalidity on that ground. Signing is not indispensable to its validity.

The order appointing a receiver cannot, as against third persons, date or relate back beyond the time of granting it. And it is irregular and improper to insert a clause to that effect in the order.

Although, to constitute a *levy*, the officer must see the goods, and they must be within his power—at least so far as to assert title to them in the presence of those who obstruct the execution of his process—it is not necessary that the debtor, or owner of the goods, shall acquiesce in the levy.

For a debt owing by all the partners—general and special—in a limited partnership, a suit is well brought against the general partners alone. And a judgment and execution in such suit, levied upon the property of the partnership, will bind the entire interest of all the partners.

The provision of the statute, that suits in relation to the business of a limited partnership, "may be brought and conducted by and against the general partners, in the same manner as if there were no special partners," must be construed to mean, not only that they may be thus brought "in the same manner," but "with the same effect."

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When a limited partnership becomes insolvent, its assets do not, from that time, irrespective of the condition of any creditor's demand, become trust funds for the benefit of all the creditors of the partnership; so as to prevent a creditor, either by superior diligence or by the favor of the partners, from acquiring or possessing a valid lien thereon in preference to other creditors.

The assets of the partnership are trust funds for the benefit of the creditors equally, except such as by superior vigilance have obtained a lien on the property of the partnership. And they become trust funds for such mode of distribution, so far as any action of the partners is concerned, at the time of insolvency; and so far as the action of creditors is concerned, at the time the court takes possession of the fund, either by decree or by the appointment of a receiver. Until that time, it is the right of every creditor to seek a preference, and to obtain one if he can, by superior vigilance.

MOTION on behalf of the Artisans' Bank and of the sheriff of Albany county, for an order to pay to the Artisans' Bank \$17,273.94, and \$74.05 costs, being the amount of their judgments, or to apply thereupon the proceeds of certain sales made by the receiver. The facts are as follows: On the 1st day of November, 1854, the five parties, plaintiff and defendants, in the second action, formed a limited partnership, under the name of W. & J. Treadwell, Perry & Norton, to commence that day and to terminate January 1, 1860; John F. Rathbone being the special partner, and the others the general partners. Before January 1st, 1860, this limited partnership, and all the general partners thereof, had become, and were, and ever since have been, and still are, insolvent and unable to pay the debts of said partnership. On the 15th day of May, 1860, and before the issuing of an execution in the first action, the action secondly entitled was commenced, by the personal service of a summons on all the defendants, for the settlement of the said limited partnership business, and the appointment of a receiver of said partnership. On the 16th day of May, 1860, by an order of this court, made on notice at special term, James C. Cook was appointed by an order of this court, in the second action, receiver of the limited partnership; his rights, powers and authorities declared in said order, to take effect as from the

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commencement of the action. On the same day the receiver gave the required bonds and entered on the duties of his office, and took possession of the partnership property, including all such as is claimed to have been levied upon under the execution in the first action. Up to the time when the receiver thus took possession, the partnership had continued to be in possession of the said property, and from that time the same continued in the possession of the receiver until it was sold. The greater part of the property was sold at auction, August 30th, 1860, under a special order of this court, but without prejudice to the rights of the Artisans' Bank. After his appointment, by special order of the court, the receiver manufactured some of the property; borrowed money as directed, and finally sold the remaining part of the property on credit, as specially directed; and he now holds notes for the purchase money, which the plaintiffs are willing to take. The Artisans' Bank commenced the action first entitled against the defendants therein, the general partners. The summons and complaint therein were served on Edward Norton, March 27th, 1860, and had been previously served on the other defendants. On the 12th day of April, 1860, an order was granted, giving the defendants twenty days' additional time to answer, and that order was served the next day. On the 5th day of May, 1860, another order was granted, giving the defendants fifteen days' further time from May 7th to answer, and that order was served the same day. At the request of the plaintiffs' attorney, this last order was waived by the defendants' attorney, May 7th, 1860, upon the written stipulation of the plaintiffs' attorney, extending for seven days further the time to answer, granted by the first order, viz. that of April 12, 1860. On the 14th day of May, 1860, in the morning, the defendants served an answer verified by Edward Norton. On the 15th day of May, 1860, at 11 o'clock A. M. the answer was returned with the objection that the time to answer, as to all but Edward Norton, had expired previously to May 7th, 1860, and that a

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joint answer could not therefore be put in. On the same day and at the same time the plaintiffs' attorney served a notice of taxation of costs for May 17th, 1860. Previously, however, to the time of returning said answer and serving said notice, and at 23 minutes after 10 A. M. of the 15th day of May, 1860, the plaintiffs' attorney had perfected a judgment without costs, and had sent an execution thereon to the sheriff of Albany county, which came to the sheriff's hands at about 5 P. M. of that day. The sheriff went to the premises that day, but did not oust the defendants of the possession of the goods, and made, as he claims, an actual levy. It is not disputed that the sheriff saw the goods, and stated that he made a levy, and claimed such levy, to the defendants, but they and the receiver claim that it was not a sufficient levy; that he did not take actual possession; and that the defendants did not acquiesce in the levy. A week or two after the receiver had taken possession, the sheriff, by virtue of an attachment against one John T. Norton, attached these same goods as the property of Norton, and with appraisers, made an inventory; of which attachment he gave public notice at the day of sale. Neither under the execution nor under the attachment did the sheriff ever take any actual possession of any of the goods, or interfere therewith, exclusive of the defendants or the receiver, otherwise than is above mentioned.

The causes of action, on which the judgment in favor of the Artisans' Bank was recovered, were against the partnership, but, as alleged by the defendants, were not contracted in the business, or for the benefit of the partnership. The judgment roll in the first action is not signed by either the clerk or the plaintiffs' attorneys. The assets in the receiver's hands are insufficient to pay the partnership debts.

The defendants in the first action, claiming the judgment therein to be irregular and unwarranted, made a motion to set the same aside, which motion was granted on terms; the judgment and execution already obtained, to stand as secu-

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riety. The action was subsequently tried before a referee, who, after hearing the parties, made a report in favor of the plaintiffs, on which judgment was again entered in their behalf.

On these facts a motion was made, before Justice GOULD, at a special term, on the last Tuesday of February, 1861, to have the receiver, out of the moneys or notes in his hands, being the proceeds of the sale of the personal property of the partnership, pay to the plaintiffs their judgment, or apply said proceeds thereon. The justice denied the motion, upon the ground that the assets of the partnership must be distributed among the creditors equally, and that the Artisans' Bank was not entitled to a preference by reason of the levy; and also on the ground that the appointment of the receiver overreached the levy, and related back, in legal effect, to the commencement of the second action. The Artisans' Bank appealed to the general term.

Ira Harris, for the appellants.

W. L. Learned, for the respondent, (receiver.)

By the Court, HOGEBOM, J. The judge at special term denied the plaintiffs' application on two grounds: 1. That the judgment and execution could not by law take preference over the demands of the general creditors of the partnership; 2. That the receiver's rights took effect by relation back to the commencement of the action for closing up the affairs of the limited partnership, which was prior to the plaintiffs' lien by execution. Either of these positions, if correct, was fatal to the plaintiffs' application; and each was a decision upon the *merits* of the application. The judge had the discretion to refuse the order, upon the ground that a case of so much magnitude was a fit case for a more deliberate consideration and investigation than were likely to be given to it upon a motion. If he had decided it upon that ground, it perhaps would not have been the subject of appeal. But he did not. We know he did not by his *opinion*; and that is

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one way—the usual way—by which we determine whether the order was the result of an exercise of the judge's *discretion*. In such cases, when we thus ascertain it has not been made for merely *discretionary* reasons, it is the subject of appeal, and liable to be reversed if erroneously decided. (*McElwain v. Corning*, 12 *Abbott*, 16. *McMahon v. Mutual Benefit Life Insurance Co.*, *Id.* 28. *Beach v. Chamberlain*, 3 *Wend.* 366.)

The order also denied to the plaintiffs the exclusive right to a sum of money amounting to \$17,273.94. It may, therefore, without an abuse of terms, be appropriately said to affect a substantial right. (*Code*, § 349, *sub.* 3. *Merritt v. Thompson*, 10 *How.* 428. *Kirby v. Fitzpatrick*, 18 *N. Y. Rep.* 484.) It seems to me beyond question appealable.

II. As the motion is made according to the notice, in behalf of the sheriff, as well as in behalf of the bank, the objection that the motion can only be made by the sheriff cannot prevail. It is in fact made by the sheriff. The technical difficulty, if there were one, is still farther obviated by the avowal on the part of the plaintiffs that they are content to have the order made, declaring the sheriff entitled to the funds, instead of the plaintiffs. But upon principle I see no objection whatever, whenever funds converted into cash are held by a sheriff, receiver, or other officer or trustee, to a motion by any one of the claimants of such a fund for their payment to him, upon notice to the other parties interested and to the officer holding the funds. It is also in accordance with long established practice.

III. I do not regard the judgment as irregular, though not signed by the clerk—at least not void, so as to enable a third person to object to its invalidity, on that ground. Whatever may have been the rule under the revised statutes or the judiciary act, it seems to me it should not be held to be so under the code. (*Code*, §§ 280, 281. 3 *R. S.* 5th ed. 638, § 10, [11.] *Judiciary Act, Laws of 1847, chap.* 280, § 53.) The present law and practice requires the judgment to be

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entered in the judgment book, and does not expressly require it to be signed. The judgment roll is to contain a *copy* of the judgment, and however fit or unobjectionable it may be, as it has been decided to be, that the clerk should sign it, I do not regard it as indispensable to its validity. (*Schenectady Plank Road Co. v. Thatcher*, 6 How. 226. *Sup. Court Rules*, 9.)

IV. The order appointing the receiver cannot, as against third persons, date or relate back beyond the order appointing him. It was irregular and improper to insert such a clause in the order appointing the receiver in this case. (*Wilson v. Allen*, 6 Barb. 542. *Rutter v. Tallis*, 5 Sandf. 610. *West v. Fraser*, Id. 653. *Gillet v. Fairchild*, 4 Denio, 80.)

Nor could its insertion affect interested parties not notified. It would be most unjust to vest the receiver with title at a period previous to the date of his appointment. It cannot have that effect in this instance.

V. I think the facts are such as to show an *actual* levy by the sheriff previous to the appointment of a receiver. To constitute a levy the officer must undoubtedly see the goods, (with perhaps one exception,) and they must be within his power, at least so far as to assert title to them, in the presence of those who obstruct the execution of his process. But it can never be necessary that the debtor or owner of the goods should *acquiesce* in the levy; otherwise many a levy would never become effectual. There may be cases where the debtor's knowledge and acquiescence may make it unimportant for the officer to pursue every step necessary to perfect a complete levy, with the same nicety and particularity that he would be otherwise expected to do; but it can never be essential to the validity of a levy to obtain the debtor's consent.

VI. It is claimed that the lien of the execution, in this case, extends only to the interests of the several defendants named therein, in the partnership property. But this position cannot, I think, be successfully maintained. It is cer-

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tainly possible to conceive that the four parties on whom process was actually served might be indebted to the plaintiffs alone, without any joint or concurring indebtedness on the part of the special partner, or of the limited partnership.

And it seems to me equally clear, that for a debt owing by all the partners, general and special—in other words, by the limited partnership—a suit is well brought against the general partners alone; and that a judgment and execution in such suit, levied upon the property of the partnership, would bind the entire interest of all the partners. This seems to follow inevitably from the provision, that “suits in relation to the business of the partnership may be brought and conducted by and against the general partners, in the same manner as if there were no special partners.” (1 R. S. 766.) This must be construed to mean not only that they may thus be brought “in the same manner,” but “with the same effect.” To give it any other construction would be to pervert the object of the statute; to mislead and deceive the creditors of the partnership.

Again. The special partner, as such, has no interest or part ownership in the property. He contributes a certain sum to the capital stock, in *cash*, and the general partners invest it, as they think proper. He has a *claim* against the partnership for the money advanced, or, as *between themselves*, for any portion of the profits which they may agree upon. He may lend money or sell goods to the firm, and to that extent become like other persons, a creditor of the partnership. But it is against the whole policy of the limited partnership act that he should have, as against third persons or the creditors of the firm, a particle of interest in the partnership property, or be able in any way to control or dispose of it. The statute, it is true, says if he attempts to interfere in the business, except in a special way and to a limited extent, carefully defined, he shall be liable as a general partner. But this evidently does not mean to increase his power, but to extend his liability. It does not mean to imply that by

so doing he can effectually acquire or dispose of an interest in the partnership property, but that he thereby contracts the liability of having *all* his property liable for the partnership debts. Much less does it mean that by this unlawful and unauthorized interference (probably not known to the creditor) he can, unless personally sued, absolutely withdraw from the partnership creditors a certain interest—*his* interest—in the partnership property.

How is the amount and extent of that interest to be ascertained? It would not appear in the *certificate* of the limited partnership, required to be filed by law. That only designates “the amount of capital which each *special* partner shall have contributed to the common stock.” (1 *R. S.* 764, § 4.) Nor would it necessarily appear in the articles of copartnership (if any there were) executed between the partners themselves. And I apprehend the law does not contemplate that, in the absence of any such designation, a nice scrutiny should be instituted to ascertain the amount in value which each partner contributed to the common stock, and declare the interest of each partner in the ultimate property of the partnership to be in the same proportion. The rule seems to me impracticable, as well as unjust, and I am persuaded it has no real foundation in the terms or spirit of the statute.

VII. The remaining question is one of great practical importance, and not unattended with difficulty. It is claimed by the receiver that whenever a limited partnership becomes insolvent, *from that time*, irrespective of the condition of any creditor's demand, its assets become trust funds for the benefit of all the creditors of the partnership; and that no creditor, either by superior diligence or by the favor of the partners, can acquire or possess any valid lien in preference to other creditors.

If this proposition is to be maintained in its full force, then it will follow as a necessary consequence, (1.) That the period of *actual insolvency* of the limited partnership is the

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true and only test to determine when the property of the partnership becomes suddenly, and by operation of law, transmuted into a *trust fund* for the general and equal benefit of all its creditors. This period may often, for a considerable time, be uncertain; and must usually for a considerable time be unknown to the creditors of the partnership; and in the general crash which follows, vigilant creditors must necessarily share the same fate with careless and unwary ones, and suffer the same extent of loss. (2.) If the period of actual insolvency is the test, then it cannot be material whether a creditor has obtained an *apparent* lien on the property by levy under a judgment and execution. It is swept away and removed *because* the law forbids any preference or precedence whatever, either by the act of the parties or operation of law, after absolute *equality* has become the law of the trust by the occurrence of insolvency. (3.) Legal proceedings for the recovery of a debt must be almost wholly nugatory. If the partnership be solvent, such proceedings will seldom be necessary. If it be insolvent, they will, if designed for the recovery of the debt or to obtain a preference, be worse than useless. For they will not only wholly fail to effect that object, but will entail upon the creditor the expenses of the proceedings. A *judgment* will be of as little avail in fixing a lien upon *real* estate, as an execution upon *personal* property. Both must fall before that equality among creditors which is the irreversible law of the trust.

In my own opinion, these consequences do not inevitably follow from the insolvency of a limited partnership. Certainly they have not been *expressly declared* by the law, and I do not think they were within the contemplation of the law makers. The statute simply provides that any disposition of the property of the partnership, made by the partnership when in a state of actual or contemplated insolvency, either of the partnership or of any partner, with the intent to give preference to any creditor over other creditors of the partnership or such partner, and every judgment confessed, lien cre-

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ated, or security given by such partnership, under like circumstances and with like intent, shall be void as against the creditors of the partnership.

The same consequence is declared as to any disposition of the property of a general or special partner, or lien created or security given thereon, with the intent to prefer any creditor of such partner or of the partnership. (1 R. S. 766, 767, §§ 20, 21.)

These provisions are all aimed at the *partners* themselves, and not at the *creditors* of the partnership. They doubtless reach and overthrow proceedings which, though *nominally* in behalf of creditors, are really *collusive* between a creditor and the partnership. But I think they were not intended to reach, and should not be permitted to overthrow, *bona fide* proceedings by a creditor *in hostility* to the partnership, instituted for the simple and honest purpose of recovering a debt and obtaining a preference by superior vigilance.

It may be that in accordance with the spirit of this enactment it is legitimate for this court, as a court of equity, to decree equality among creditors who have not obtained any superior lien, upon the complaint of a simple contract creditor in an action in which the partners are made parties, and such creditors as choose to come in under the decree, (*Janes v. Lansing*, 7 Paige, 583; *Whitewright v. Stimpson*, 2 Barb. S. C. R. 379;) and even to declare that such rule must be applied to all those creditors who have not obtained a superior lien at the time the court takes jurisdiction of the fund by the appointment of a receiver—which is as far as any adjudicated case has gone, that has come to my notice, except the case of *Jackson v. Sheldon*, (9 Abbott, 127,) to which I shall presently refer.

But this is as far as I am willing to go. And if the case of *Jackson v. Sheldon* was intended to go farther, and to make an equal division of the assets among those who were creditors *at the moment* of actual or contemplated insolvency, whatever might be the *shape* in which their demands

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might be, whether in judgment or execution, or progressing towards it, and reaching that stage before the appointment of a receiver, I think the case was not well decided, and ought not to be followed.

The chancellor, in *Innes v. Lansing*, (7 Paige, 586,) has employed language countenancing the idea that it is the duty of the court to carry into effect the principle of the statute, which is "an equal distribution of the partnership effects among all its creditors, by treating the property of the limited partnership after insolvency as a trust fund for the benefit of all the creditors." And Mr. Justice Davies, in *Jackson v. Sheldon*, (9 Abbott, 134,) has said, "on the happening of insolvency, the assets of a limited copartnership, equally with those of a moneyed corporation, have attached to them the character of trust funds, in which all creditors are entitled equally to participate, and in which no one can share to the disadvantage of the others."

In a general sense these remarks are true, in both the cases above cited. The assets are trust funds for the benefit of the creditors equally, except such as by superior vigilance have obtained a lien on the property of the partnership. And they become trust funds for such mode of distribution, so far as any action of the partners is concerned, at the time of insolvency, and so far as the action of creditors is concerned, at the time the court takes possession of the fund, either by a decree or by the appointment of a receiver. Until that time, in my opinion, it is the right of every creditor to seek a preference and to obtain one if he can, by superior vigilance.

In *Innes v. Lansing*, which did not raise the point now in controversy, the chancellor concedes that the suit brought by the creditor, for equal distribution, might be *discontinued* at any time before decree, on payment of his debt and costs, or other arrangement with the partners. And in arguing the right of a simple contract creditor to bring such a suit, he says, "it is evident from these statutory provisions, that the

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legislature could not have intended that a creditor of such insolvent limited partnership should be compelled to proceed to judgment and execution at law, *the necessary effect of which might be to give him a preference over other creditors*, before he could be permitted to file a bill in this court to prevent the partnership funds from being wasted by the insolvent partners, and to obtain payment of a ratable proportion out of the fund."

In the case of *Jackson v. Sheldon*, it is also obvious that the decision of the court was mainly founded upon the idea of a *collusion* between the partners and the prosecuting creditor. And Justice Clerke dissents from the opinion of a majority of the court, because he found no sufficient evidence of such collusion. The case, therefore, may well be regarded as authority for the result which the court reached, by reason of the conclusion on the important question of fact at which a majority of the court arrived, without making it decisive upon the other important legal principle above discussed. As to this last, I do not regard it as of controlling force.

My own impressions are, therefore, in favor of the conclusion that the plaintiffs, or the sheriff, are entitled to the fund in question, to the extent of the plaintiffs' judgment. But the case is one of very considerable magnitude, and the legal principles involved not altogether decisively settled. Some of the questions of fact, especially those relating to the levy claimed by the receiver, seem not to be entirely clear, and the question itself is one which may with propriety go to the court of last resort, which it is alleged it is not plain can be done by appeal from our order. I am therefore inclined, in accordance with the suggestion of the counsel for the respondent, to give to this matter the direction proposed by him; that is, to give the plaintiffs the opportunity to determine the question in a more deliberate way, by the institution of an action.

The order of the special term should therefore be affirmed, with ten dollars costs in the court below and in this court, to

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the party finally successful in obtaining the fund; without determining the question of right, and without prejudice to a proper action for said fund or its proceeds by the Artisans' Bank, or the sheriff, against the receiver and such other parties as they shall be advised, (which action is hereby authorized to be brought,) and with an injunction against the receiver, to restrain him from disposing of such fund to the prejudice of the plaintiffs until the determination of said action, or until the further order of this court.

[ALBANY GENERAL TERM, May 6, 1861. *Gould, Hogeboom and Peckham, Justices.*]

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A reservation, in a deed, is always of something issuing or coming out of the thing or property granted, and is not a part of the thing itself. And, to be a good reservation, it must be to the grantor or party executing it, and not to a stranger to the deed.

Where the plaintiff, being the owner of land on which there was a well of water, conveyed the land to T., "*reserving* a privilege in the well, for the lots owned by B. on the east and D. on the west," *it was held*,

1. That this was a reservation, and not an exception.
2. That the rule of law, in construing such a reservation, is to hold to a strict construction of the words used, as against the grantor; and in case of any uncertainty or ambiguity, the party against whom the reservation is made is entitled to the benefit of it.
3. That under this rule of construction the reservation was inoperative, for the reason that it was not made to the grantor, and the clause did not admit of a construction which would give it to him; and that it could not be made to a stranger to the deed.
4. That the clause was to be construed as a reservation to B. and D., and not to the grantors; notwithstanding the fact that the latter, at the time of making the conveyance to T., was in possession of the D. lot, under a contract to purchase the same.

THE plaintiff, being the owner of a house and lot upon which there was a well of water, conveyed the premises to one Anna Tompkins "*reserving* a privilege in the well,

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for the lots owned by Joshua Brown on the east, and Ogden Drake on the west." This action only involves the right of the Drake lot to the use of the well. The reservation states that the lot for which the plaintiff now claims the reservation was, at the date of the said conveyance, owned by Drake; and such was the fact. The plaintiff claimed that inasmuch as, at the time of this conveyance containing the reservation, he, the plaintiff, was in the possession of the Drake lot, under a contract of purchase from Drake. We should construe this as a reservation to the plaintiff himself, and not to Drake. And this presents the real question in the case. The defendant holds and claims the well under a conveyance of the lot upon which it is situated, directly from Anna Tompkins, the plaintiff's grantee

By the Court, MASON, J. It is the proper office of an exception in a deed, as distinguished from a reservation, to exempt from the operation of the deed a part of that which is granted or comprised within the generality of its terms. It must be of such a part as is severable from the rest. (1 *Preston's Shep. Touch.* 78. 21 *Wend.* 290. 4 *Edw. Ch. R.* 711. 1 *Seld.* 33.) The character of a reservation is always of something issuing or coming out of the thing or property granted, and not a part of the thing itself; and to be a good reservation, it must always be to the grantor or party executing it, and not to a stranger to the deed. (1 *Preston's Shep. Touch.* 80. 1 *Seld.* 33, 38. 18 *Bacon's Abr.* 460. *Whitlock's case*, 8 *Co.* 69. 8 *John.* 73, 75.) Nor can a condition be reserved to a stranger to the deed. (4 *Kent's Com.* 127. 12 *Barb.* 460.) This is most clearly a reservation, and not an exception; and the question presented depends upon the construction to be put upon the reservation. The rule of law, in construing such a reservation, is to hold to a strict construction of the words of the reservation, as against the party whose words they are. And so strict is the rule in this respect, that if any advantage

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can be gained from any uncertainty or ambiguity in the words, the party making the reservation is not entitled to it, but the party against whom the reservation is made is entitled to the benefit of it. (1 *Prest. Shep. Touch.* 88. 3 *John.* 387. 8 *id.* 394, 400. 1 *Seld.* 33, 40.) Applying this rule of construction to the reservation in the plaintiff's deed to Anna Tompkins, I can come to no other conclusion than that this reservation is wholly inoperative, for the reason that it is not made to the grantor, and cannot be made to a stranger to the deed. The reservation is as follows: "Reserving a privilege in the well for lots owned by Joshua Brown on the east, and Ogden Drake on the west." Now it cannot be pretended that a reservation to either Brown or Drake would be valid, for they are strangers to the deed. Nor can a reservation to their lots be made, for their use. The reservation cannot be allowed to the plaintiff, for the reason that applying the strict rule of construction which the law imposes against him, the reservation does not admit of a construction which would give it to the plaintiff. Upon a fair construction of the clause, it may be held a reservation to Brown and Drake. The reservation states that the lot for which the plaintiff now claims the reservation was at that date owned by Drake; and such was the fact.

Upon this state of the case, no one could doubt but we should hold it a reservation to Drake, and no one else. The plaintiff claims that as, at the time of this conveyance containing the reservation, the plaintiff was in possession of the Drake lot under a contract of purchase from Drake, we must construe this as a reservation to him, and not to Drake. The difficulty with this argument is, that it requires us to reverse entirely the rule of construction in regard to reservations, because when the fact is admitted that the plaintiff was in possession of this Drake lot, under a contract to purchase, the question still remains, on the construction of the reservation, whether the plaintiff did not, in fact, intend to reserve it to Drake as owner of the title, instead of himself

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as owner in equity; and if there is any ambiguity in this respect, and any advantage can arise from the uncertainty, the law gives it to the defendant, and not to the plaintiff. There is no intimation in the reservation that the plaintiff had any interest in the Drake lot, or that he intended to reserve to himself any privilege in regard to this well in question. On the contrary, so far as we can derive any intent from the language of the reservation, it was to reserve this privilege to Drake as owner of the lot.

The plaintiff, perhaps, supposed that as Drake was the owner, and he was under contract to convey the lot to him, it would be as well to make the reservation to Drake, and he would take it by conveyance from him.

At any rate, it is a very forced construction of this reservation to hold it as made to the plaintiff, who is in nowise referred to or mentioned in it; and as he must claim, if at all, upon the plain and strictest construction of the language of the reservation, I do not see how we can give it to him. I advise that a judgment be entered for the defendant, with costs to be taxed.

Judgment for the defendant.

[OTSEGO GENERAL TERM, July 14, 1857. *Gray, Shankland and Mason, Justices.*]

RICHARDSON vs. THE CITY OF BROOKLYN.

A contract in writing was entered into, on the 14th of February, 1854, between J. B. and the city of Brooklyn, by which the former agreed to furnish all the materials and do the work necessary to grade and pave Washington avenue and D. street to the Flatbush line, in the manner specified; and the city agreed, in consideration of the due and faithful performance of the contract by J. B., to cause due diligence to be used in laying, confirming and collecting the assessment for the cost of said work, and to pay J. B., his heirs or assigns, the price per running foot therein specified, as the same should become due, and be received into the treasury from said assessment. On the 27th of January, 1855, J. B. made an order in writing.

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whereby, for value received, he directed the city to pay out of the money due to him on said contract, \$2000, to R. P. or order. In satisfaction of which order, the city, on the 17th of December, 1855, issued a certificate, under its corporate seal, certifying that there would be due from the city to J. B. or R. P. or order, on contract for Washington avenue grading and paving, &c., \$2000, payable upon the surrender of the certificate when the assessments for said improvement should have been collected and paid into the city treasury. In an action by the holder and assignee of the certificate, against the city, for negligence in not collecting the assessments out of which the certificate was payable, it appearing that the assessment upon the property benefited had been duly made and confirmed by the corporation, and a warrant issued in due season, to collect the money, which was returned unsatisfied, for want of purchasers, after the property had been duly advertised and offered for sale; *it was held* that the city was not bound to advertise and offer to sell the property a second time, in the hope of obtaining a purchaser; and that it was not guilty of negligence in omitting to do so.

In such a case it is the duty of the contractor, or the holder of the certificate, to attend the sale and bid in the property, for the protection of his own interests, and resell it for his own benefit.

The contractor makes his bargain, and undertakes the work, with express reference to the source from whence he is to receive payment. And if the source proves insufficient to recompense him for what he has done, the statute has provided no means for his indemnity. *Per BROWN, J.*

THE complaint in this action alleged that on the 14th day of February, 1854, the defendants and one James Bennett made a contract in writing, by which the said James Bennett agreed with the defendants to furnish all the materials and do all the work necessary to grade and pave Washington avenue and Douglass street to the Flatbush line, in the city of Brooklyn, in the manner set forth in said contract; that previous to making said contract, the defendants had by resolution determined to make the above named improvement, and had by resolution duly authorized the said contract to be made with the said James Bennett, at the price or sum of three dollars and thirty-nine cents per running foot through the center; and the defendants, in and by the said contract, did agree with the said James Bennett, in consideration of the due and faithful performance of the said contract by the said Bennett, to cause due diligence to be used in laying,

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confirming and collecting the assessment for the cost of said work, and to pay or cause to be paid to the said James Bennett, his heirs or assigns, the said contract price, as the same should become due, and be received into the treasury from said assessment. The plaintiff further alleged that the said James Bennett duly performed all the conditions of the said contract on his part, prior to the 17th day of December, 1855. And that on the 27th day of January, 1855, the said James Bennett made an order in writing, whereby, for value received, he directed the defendants to pay out of the moneys due to him on the said contract, two thousand dollars to R. P. Perrin, cashier, or order, which said order, on the 27th day of January, 1855, was duly filed with the defendants; and that in satisfaction of the said order, the defendants, on the 17th day of December, 1855, duly executed, under their corporate seal, a certificate in the words and figures following:

“No. 713. \$2000. This certifies that there will be due from the city of Brooklyn to James Bennett or R. P. Perrin, cashier, or order, on contract for Washington avenue grading and paving from Douglass street to city line, the sum of two thousand dollars, payable upon the surrender of this certificate, when the assessments for said improvements shall have been collected and paid into the city treasury.

In witness whereof, these presents are executed this seventeenth day of December, 1855.

[L. s.]

GEORGE HALL, Mayor.

Attest, S. J. Burr, Assistant City Clerk.”

Countersigned by the comptroller.

Which said certificate the defendants delivered to the said R. P. Perrin, cashier; that the said Perrin duly indorsed the same on the back thereof for value received, and directed the defendants to pay the same to William A. Coit, or order, and delivered the same to the said Coit; that the said William A. Coit, for value received, indorsed and delivered the same to the plaintiff, who is now the lawful owner and holder

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thereof; that the said certificate has not been paid, or any part thereof; that the assessment for the cost of the said work was duly confirmed on the 5th day of June, 1854; that the defendants might, with due diligence, have collected the whole assessment for the cost of the said work, on or before the first day of January, 1856; that they did not cause due diligence to be used in collecting the said assessment, whereby the said assessment has not been yet collected, nor sufficient thereof to pay any part of the aforesaid certificate. Wherefore the plaintiff demands judgment for the sum of two thousand dollars, with interest from January 1st, 1856, and costs.

The answer was a general denial. The action was tried by a jury, in the city court of Brooklyn, in April, 1861. Verdict in favor of the plaintiff, for \$2746.27. From the judgment entered thereon the defendant appealed. The other material facts are detailed in the opinion of the court.

D. P. Barnard, for the plaintiff.

Alexander McCue, for the defendant.

By the Court, BROWN, J. This is an appeal from a judgment recovered by the plaintiff, in the city court of Brooklyn. The plaintiff is the holder of a certificate dated 17th December, 1855, signed by George Hall, mayor, S. J. Burr, assistant city clerk, and countersigned by William B. Lewis, comptroller of the city of Brooklyn, for \$2000, which will be due to James Bennett or R. P. Perrin, cashier, or order, on contract for grading Washington avenue, payable upon the surrender of the certificate, when the assessments for such improvements shall have been paid into the city treasury. James Bennett was the contractor, and had performed the work. The expenses of the improvement had been duly assessed upon the property benefited, and a warrant duly issued to the collector to collect the assessment, which was returned

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unsatisfied. The lands charged with the assessment were advertised and put up for sale on the 11th day of October, 1855, and a portion of them sold to bona fide purchasers; the proceeds of which sale were duly applied in satisfaction of a part of the expenses of the work, and the residue of the lands were offered for sale, and no one bidding or offering to purchase the same, they were struck down by the officer to James Bennett, the contractor, who had not perfected the sale by accepting the certificate in satisfaction of the assessment, interest and expenses. The payees or holders indorsed over the certificate to one William A. Coit, who indorsed it over to the plaintiff. The action is for negligently omitting to enforce the collection of the assessments and to pay the money in satisfaction of the certificate.

This is the third judgment that the plaintiff has obtained in the city court in this action, for the recovery of the money mentioned in the certificate. The first judgment was reversed in this court for misdirection of the judge upon the trial. (*Richardson v. City of Brooklyn*, 31 Barb. 152.) The second judgment was reversed, because it appeared the contractor himself had become the purchaser of the property charged with the payment of the tax, and had not completed his purchase, and that the defendant had received no money applicable to the payment and unapplied to the payment of the charges for the improvement. Some new facts appeared upon the last trial, to which I will refer. It appeared from the proof that James Bennett, the contractor, was not present at the sale, and no one bid for him. Nine parcels or lots were struck down to G. W. Chapman, and the residue the street commissioner says he struck down to James Bennett, the contractor, but without his authority. There were no bidders for the property struck off to Bennett. Archibald T. Lawrence, the street commissioner, who conducted the sale, says that he held the bid open for any party to take the title of Mr. Bennett, and found no purchaser; by which I understand him to mean, that he was ready at all times to execute

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and deliver the certificate of sale to any person or persons who would take the property at the bid and pay the assessment, interest and expenses. He also testified that he had not been applied to, nor had any one else in his office been applied to, to readvertise and resell the lots. To the same effect was also the testimony of the street commissioner, William W. Gardner. William A. Coit, the plaintiff's assignor, also testified that he had called upon Lawrence, the comptroller, and also on the street commissioner, and insisted that if the money was not collected, the property should be resold, and was told that it had been struck down to Bennett, who would pay soon. He further said, that about three months thereafter, "I offered to take an amount of the property sufficient to pay the certificates, but they would not do it unless I paid the interest and damages, &c. amounting to \$600 or \$700, and I could get none unless I took the whole. Lawrence, the street commissioner, offered that if I would take a transfer of any of the parcels knocked down to Bennett, and pay what was due on them for interest and expenses, he would allow me to do so, and I to receive from the comptroller so much of the amount which they received as might be applicable to the payment of the certificates." It was admitted there was no money in the possession or treasury of the city applicable to the payment of the expenses of the improvement.

By reference to the contract between Bennett and the city, set out in the case, the latter agreed to receive the payment for the work stipulated in the contract, as the money should be collected from time to time on the assessments therefor; and the city also agreed, on its part, to cause due diligence to be used in laying, confirming and collecting the assessments for the cost of the work, and pay the same to the contractor, as the same should become due and be received into the treasury. The obligation of the city is not to pay the expenses of the improvement, absolutely. The expenses are not a charge upon the city generally, but upon the persons

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and the property benefited. The city was diligently to execute the power given to them by the statute, to assess and collect the money, and when collected to apply it in payment of the cost of the work. The proof taken in the action shows that the assessment was made and confirmed. A warrant was issued in due form and season to collect the money, which was returned unsatisfied, with the usual affidavit of the collector, that there were no goods and chattels out of which the collector could make the money, and that he had given and published the requisite notices. That the property charged with the payment of the expenses had been duly advertised and offered for sale, and that there were no purchasers who were willing to accept a title for such lands, and pay the amount assessed, with the interest and expenses.

Up to this stage of the proceedings, there is no lack of diligence attributed to the city, or its officers. The letter of the statute under which the improvement was made, was complied with. And if there was any thing else to be done by the city to exonerate itself from the charge of negligence, it results by implication, and not from express direction. The plaintiff contends that the collector of the city was bound to readvertise, and offer and attempt to resell the property charged. The city, he says, was under an obligation to incur the expense of advertising the property for 12 weeks longer in all the corporation newspapers, and offering it for sale again at auction, in the hope of finding bidders at that time. It is to be noticed that this class of sales are not sales made for whatever sum of money may be the highest sum bid for the particular lot offered, but the sale is to the bidder who, for the lowest term of years, will take the same and pay the amount of the tax charged upon the lot, with the interest and expenses. The bidder must take the lot at the fixed price, and nothing less, and the competition is upon the duration of the term for years, and not upon the price to be paid. See section 26, title 5, of the act of the 17th of April, 1854, to consolidate the cities of Brooklyn and Williams-

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burgh and the town of Bushwick. The city of Brooklyn did not fail to effect a sale of the lots struck down to Bennett from any irregularity in the proceedings, or omission to give the proper notice, or the misconduct of its officers. It failed to effect a sale and to realize money therefrom to pay the expenses of the improvement, because no one of all the inhabitants of a populous city, after a notice of the sale for 12 successive weeks in the public papers, could be found who would accept the title for any term of time for the lands, and as an equivalent therefor, pay the tax and the interest and expenses.

Improvements in cities—improvements local in their nature, such as the construction, grading and paving streets and avenues, the cost of which is by law chargeable upon the property in the immediate vicinity—are often pushed far beyond the public wants and necessities, and quite as often against the will of the land owners who are thought to be benefited. It may happen—nay, it does happen—and, judging from the evidence, it has happened in the case of grading and paving Washington avenue, that the cost of the improvement exceeds the present value of the property charged with the burthen of its payment. Bankruptcy and ruin caused by the coercive improvement of one's property, is no novelty. The contractor makes his bargain, and undertakes the work with express reference to the source from whence he is to receive payment. And if the property proves insufficient to recompense him for what he has done, the statute has provided no means for his indemnity. This consequence may have been intended to operate as a salutary restraint upon improvident and needless improvements. When the lands charged with the payment of the tax are advertised and brought to a sale, the duty of the contractor and those to whom he may have assigned the certificates given for his compensation is plain enough. They cannot absent themselves from the sale, and leave the affair to take care of itself, and

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when it fails, for want of purchasers to take the property and pay the tax, call upon the city collector to readvertise and offer the lands for sale from time to time, and as often as may be necessary, until a purchaser can be found. The provision of the statute regulating and providing for the sale, must receive a reasonable interpretation; and it is far more reasonable to say that the contractor, or person claiming the tax, must take care of his own interest, bid in the lands himself, and resell them at his own convenience and for his own benefit, rather than say that the officers of the city are to advertise and offer to sell a second, and perhaps a third time, in the hope that some disinterested person will purchase.

In the present case, the lots which no one would purchase were bid off in the name of James Bennett, the contractor, and he, or those entitled to his compensation, could have had the title to the lands in satisfaction thereof. The plaintiff's assignor, William A. Coit, was offered by the collector any of the parcels struck off to Bennett, upon his paying what was due upon them, and be allowed and credited his just and appropriate share of the money applicable to the payment of the certificate which he claims to recover in this action. I will not say that the officers of the city might not, within the limit of their authority, have readvertised and made another effort to sell the property. I will not say that their power was expended, and, in respect to the lands, they were *functus officio*. But I think, in view of all the circumstances disclosed by the proof, they were under no legal obligation to do any thing of the kind, and that the charge of negligence and want of diligence, set up in the complaint, was not made out. In *Beard v. The City of Brooklyn*, (31 Barb. 142,) which was a similar action for the negligent omission to enforce the collection of a street assessment, the warrant was issued to the collector in July, 1848. It had not been returned, and no other effort or proceedings were had by the officers of the city to collect the tax. In its

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principal features it has little resemblance to the case under consideration.

The judgment of the city court should be reversed, and a new trial granted, with costs to abide the event.

[ORANGE GENERAL TERM, September 9, 1861. *Emott, Brown and Scrugham*, Justices.]

DISOSWAY vs. WINANT.

An order was made by commissioners of highways, laying out a highway, from which four individuals appealed, separately, to the county judge, who thereupon appointed three referees to hear and determine the same. The appeals were all heard together, at one and the same time, and the determination of the commissioners affirmed, four separate orders of affirmance being made. *Held* that the referees were not entitled to receive compensation for their services, each, at the rate of \$2 per day, for each appeal, but that each referee was only entitled to \$2 per day for the time he was employed in hearing and determining the question referred to them in regard to laying out the road, without reference to the number of appeals or appellants.

Whatever may be the number of appeals, there should be but one set of referees, but one proceeding, or hearing and determination, and only one order to signify what that determination is.

Where an order of commissioners of highways, laying out a highway, is affirmed by referees, on appeal to the county judge, the fees of the referees are to be paid by the parties appealing. If there are several appellants, the obligation to pay is joint and several, and may be enforced in an action by the referees, or their assignee, against one, only, as well as in an action against all the appellants.

THE commissioners of highways, of the town of Westfield, made an order laying out a highway, on the application of the plaintiff. From this order the defendant in this action and three other persons separately appealed to the county judge of Richmond county. Three referees were appointed, pursuant to statute, to hear and decide the four appeals. The four appeals were heard and argued together, the testimony given before the referees being taken upon all the ap-

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peals. In the hearing and determination of all these appeals, the referees were occupied sixteen days. For their services on these appeals the referees charged two dollars *per diem* on each appeal, (as if heard separately,) or eight dollars for each day actually employed, making in all \$384. This amount was paid by the plaintiff, and after payment the referees made four assignments, one on each appeal, purporting to assign to the plaintiff a demand against each of the appellants for \$96, referees' fees; and four actions were brought by the plaintiff, one against each appellant, and each to recover \$96.

This action was brought upon one of the claims assigned as above stated, (on the "appeal of Joseph C. Winant.") It was tried in November, 1860, before Mr. Justice LOTT, without a jury. He decided that the plaintiff was entitled to recover the full amount claimed. From the judgment rendered upon his decision the defendant appealed to the general term.

William Fullerton, for the plaintiff.

M. Hale, for the defendant.

By the Court, BROWN, J. On the 31st of October, 1853, the commissioners of highways of the town of Westfield, in the county of Richmond, upon the application of Gabriel Disosway, the plaintiff in this action, made an order in due form, according to the statute, laying out a highway in such town, which was filed and recorded in the clerk's office of the town on the 29th of November of the same year. From this order the defendant, Joseph C. Winant, and three other inhabitants of the town, to wit, James Johnson, jun., Winant Winant and James Johnston, appealed, separately, to the county judge, who thereupon appointed three referees to hear and determine the same. The appeals were all heard together, at one and the same time, and the determination of the

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commissioners laying out the highway affirmed. The decision of the referees, in writing and signed by them respectively, was filed and recorded in the town clerk's office on the 23d of January, 1860. In the performance of this duty they were actually employed, one of them 16 days, another 15 days, and the other 17 days, being in all 48 days. They each claimed to receive compensation for their services at the rate of \$2 per day for each appeal, being \$8 per day to each referee for the number of days he was employed in hearing and determining the question of laying out the road. They declined to deliver over the order made by them, affirming the action of the commissioners, until their fees were paid. Whereupon the plaintiff in this action, upon whose application the road was laid out, paid their fees for services at the rate of \$96 in each separate appeal, and took an assignment of their claim, and thereupon brought this action to recover from the defendant \$96, the sum claimed to be due from him for the services rendered in hearing and determining his appeal. The defendant, in his answer, denied the right of the referees to the compensation claimed, and averred that they were each of them entitled to receive \$2 per day, and no more, for each day they were employed in hearing and determining the question referred to them in regard to laying out the road, without reference to the number of appeals or appellants. For a further answer he also alleged a want of parties, and averred that James Johnson, jun., Winant Winant and James Johnston, were jointly liable with him to pay whatever compensation was due for the services rendered, and should be made parties defendants with him. The action was tried before Mr. Justice Lott, without a jury, at the Richmond circuit, who rendered judgment against the defendant for the sum claimed, with the interest, being \$102.16, with the costs of the action; from which the defendant appealed to the general term.

The 8th section of the act of the 14th December, 1847, to amend the act concerning town officers and town and coun-

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ty expenses, and to prevent abuses in auditing such accounts, substitutes three referees in place of three judges of the court of common pleas, as the tribunal for hearing and determining appeals from orders of commissioners of highways, either in laying out, altering or discontinuing any road, or in refusing to lay out, alter or discontinue any road, and declares that such referees shall possess all the powers and discharge all the duties heretofore possessed and discharged by the three judges under title first, article 4th, chapter 16th of the first part of the revised statutes. These appeals from the judgment of the commissioners may be brought by any person who shall conceive himself aggrieved thereby. The route of roads proposed to be laid out, and of those already laid out and proposed to be altered or discontinued, are seldom confined to the lands of one proprietor. They usually, and in the present state of the country almost universally, extend through and affect the lands of various proprietors. In this aspect—to say nothing of the inhabitants of the town who are to be charged with the expense of making and maintaining the road and entitled to its beneficial enjoyment—there will usually be a number of persons more or less entitled to the right of appeal. In an appeal from an order laying out or refusing to lay out a highway, however numerous may be the number of persons who separately exercise the right of appeal, assuming the regularity of the proceedings, there can be but a single question—a single issue—upon which the referees are to exercise their judgment, and that is, whether they will affirm or reverse the decision of the commissioners of highways, with this qualification, that if they shall reverse an order refusing to lay out or alter a highway, they are to proceed themselves to lay out or alter the road applied for. The framers of the statutes had this unity of action upon several appeals from the same determination of the commissioners in mind at the time they performed their work; for both the old and the new statutes provide that appeals must be brought within sixty days from the time of filing the com-

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misioners' order in the town clerk's office. And the act of 1847 also declares that the county judge shall appoint the referees after the sixty days given for the purposes of appeal shall have elapsed. By the 8th section of this latter act they are to hear and determine all the appeals that may have been brought within the sixty days, and before proceeding to hear the appeal or appeals, are to be sworn faithfully to hear and determine the matters referred to them. So by the 89th section of the act in regard to laying out public and private roads, (1 R. S. 514,) "the judges to whom the first appeal from any such determination shall be made, shall have exclusive jurisdiction of all appeals from the same determination, to the end that their decision when made may embrace the whole subject. And for this purpose they shall suspend all proceedings upon the appeal first made, and upon all other appeals received by them from such determination, until the time limited for such appeal shall have expired. The appeal is a very simple proceeding, requiring no petition of appeal, no case or bill of exceptions, and no security. But a notice only addressed to the judge, signed by the party appealing, stating briefly the ground upon which it is made, and whether brought to reverse entirely the determination of the commissioners, or only a part thereof, and specifying such part. Both the statutes exhibit a clear purpose, that whatever may be the number of appeals, there shall be but one set of referees or appellate judges, but one proceeding or hearing and determination, and one order to signify what that determination is. In the present case this purpose was observed, to the letter, with the single exception that four separate orders were made, affirming the decision of the commissioners. I am unable to find any authority or reason for four separate orders, or any useful object to be attained thereby. On the contrary, the multiplication of the order of the referees would effect a most mischievous incumbrance of the town records; because, when the appeals were from an order refusing to lay out the road, and the order should be reversed, the referees

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would then proceed to lay out the road, describing it particularly by routes and bounds, and by courses and distances, in their certificate or order, and this order and proceeding must (according to the practice claimed by the plaintiff in this action) be repeated and multiplied, to correspond with the number of persons who may have appealed from the original order. One order referring to the several appeals in the title is obviously sufficient for all the purposes contemplated by the statute.

The legislature, however, has not left its intentions to inference, or to be collected from an examination of the objects and purposes of the act. It has declared, in express words, what shall be the compensation of the commissioners, for what services they are to be compensated, and who shall provide and pay the same. Section 9 of the act of the 14th of December, 1847, declares that, "every referee appointed under the preceding section, shall be entitled to receive two dollars for every day employed in the hearing and decision of such appeal or appeals." This provision is a substitute for section 94 of the act in regard to laying out public and private roads, (1 *R. S.* 2d ed. 515,) which is in these words: "Every such judge shall be entitled to receive two dollars for any day employed in the hearing and decision of such appeal." The framers of the act of 1847, in transcribing the provision of the old act, have added the two words, "or appeals," which are very significant of their intention. These words were added for some purpose, which could be nothing less than to put it out of the power of the referees to do what has been done in the case of the Westfield road—to receive more than two dollars per day for the hearing and determination of all appeals heard by them from the commissioners' order. When the compensation is a per diem allowance, I am unable to see what moment it is to the referees whether there is one appeal or fifty. There is but one order appealed from, and they are to receive two dollars for every day they are employed. The gross sum to which they are entitled, is to be regulated by

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the number of days they are employed, and not by the number of appeals they may have heard from the same order. The referees in the case of the Westfield road, in making up the amount of their compensation, first ascertained the number of days they were employed, which was 16 for one of them, 17 for another, and 15 for the third, making 48 days in all. They then multiplied this sum by 4, the number of the appeals from the order, making 192 days, for which they demanded and received compensation. The bare statement of the proposition is its own refutation; for no argument could add to the folly and absurdity of asserting that a man could actually be employed four mortal days within the space of 12 or 24 hours. The illegality and injustice of this mode of computing the referees' compensation is, however, not so flagrant, at first sight, in its application to the case of the Westfield road; because the order of the commissioners was affirmed, and the referees' compensation is distributed and assessed upon the four different appellants, who are each charged with the sum of \$96. But change the picture, and suppose the order appealed from an order refusing to lay out a public road, and that in place of four there had been fifty appeals, as there might have been, and that the order had been reversed after sixteen days employed in the hearing. It would then have become the duty of the referees to proceed to lay out the road by metes and bounds, courses and distances, and their expenses would have become a charge upon the town. Would fifty separate orders have been tolerated as necessary to the decision of the appeals, and could the town have been legally subjected to the payment of \$1600 to each referee? This is an extreme case, and one not likely to occur, but it tends to show to what the rule contended for by the plaintiff would lead if it could be sanctioned. The relation which the town would maintain to these supposed proceedings is that of respondent, seeking to uphold one order, made by one class of its officers, against appeals taken to its validity by fifty several appellants, which the law re-

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quires shall be heard and determined together, at the same time, and by the same appellate tribunal. The separation of such a proceeding into several parts, for the purpose of enhancing the compensation of the referees, or for any other purpose, is at variance with the spirit as well as the letter of the statutes.

The sum of \$96, which the referees in the case of the Westfield road are doubtless entitled to receive, is to be paid to them by the party appealing, because the order was affirmed. This is the direction of the 9th section of the act of 1847. The parties appealing are those who brought the appeals, and at whose instance the litigation is had. The law imposes upon them the duty and obligation of paying the per diem compensation of the referees, when the order appealed from is affirmed. When several persons appeal, the obligation to pay is a joint obligation which the law imposes upon them all. It follows that James Johnston, James Johnson, jun. and Winant Winant, the other appellants, are necessary parties defendants to the action. The plaintiff paid the referees' fees and took an assignment of their claim, whatever it might be, and it is unnecessary, therefore, to say whether they jointly or separately had a right of action to recover their compensation, because the plaintiff is the assignee of each of them.

There should be a new trial, with costs to abide the event.

The other members of the court concurred in these views and conclusions, with this exception. They were of opinion that the obligation to pay the fees of the referees was joint and several, and might be enforced in any action against one as well as in an action against all the appellants, from the commissioners' order. That the plaintiff, being the assignee of each of the referees, and thus uniting in himself their several claims, could maintain this action to recover the \$96 due to the three referees, with the interest, and which, when

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paid, would be a satisfaction of the entire claim for services rendered by them.

The judgment, for this reason, was ordered to be affirmed.

[ORANGE GENERAL TERM, September 9, 1861. *Emott, Brown and Scrug ham, Justices.*]

 LOWNDES vs. DICKERSON.

Oysters, planted by an individual in a bed clearly marked out and defined, in the tide waters of a bay or arm of the sea, which is a common fishery to all the inhabitants of the state where the bay or arm of the sea is situated, and where there are no oysters growing spontaneously, at the time, are the property of the person who plants them; and the taking them by another person is a trespass, for which an action lies.

It is indispensable to the existence of the right of property in oysters thus planted that the bed shall not interfere with the exercise of the common right of fishing; for if the oysters were mingled with and undistinguishable from others, of natural growth, in the public waters, the interest of the person planting them would be subservient to the public use. *Per BROWN, J.*

Northport Harbor, being an indentation upon the southern shore of Long Island Sound, is a part of the high seas, with reference to the question of individual ownership of oyster beds planted therein.

Although diverse opinions have been given, in this country and in England, upon the subject, the weight of authority seems to be adverse to the existence of any power in the British crown to grant to an individual the right of taking fish in the sea and in the creeks and arms thereof, in exclusion of the common liberty. *Per BROWN, J.*

The right of fishing in the sea is a common right; that is, a right inherent in all the people of the realm, by the common law. It is one of those rights held by the sovereign power, in trust for all the people.

Nothing passes by grant, in derogation of such rights, by implication.

Grants of this description are construed strictly, and an intention to part with any part or portion of such rights will not be presumed, unless clear and special words are used to denote it.

The title to the lands under the waters of Northport Harbor, in Long Island Sound, is not in the town of Huntington; and the inhabitants thereof have not the exclusive right to take fish therein.

34 586
62 240
7h 108
22h 56
24h 490
47h 388
68a 77
91a 106
103a 113

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THIS action was heard on exceptions taken at the trial, by the defendant, which exceptions were ordered to be heard in the first instance at the general term. The nature of the action and the facts appearing, and the exceptions taken, on the trial, are stated in the opinion of the court.

S. E. Lyon, for the plaintiff.

Henry Nicoll, for the defendant.

By the Court, BROWN, J. This is an action of trespass *de bonis asportatis*, tried before Mr. Justice EMOTT, at the Suffolk circuit, in June, 1860, where the plaintiff had a verdict. The wrong consisted in taking and carrying away a quantity of oysters from the bed or bottom of Long Island Sound, about 100 yards from the shore, within or adjacent to the town of Huntington, in the county of Suffolk, where the plaintiff had deposited or planted them. The taking of the oysters was not disputed upon the trial, but the point litigated was the right of property in the plaintiff, and his right to maintain this action.

Upon the trial the plaintiff gave evidence tending to show that he commenced planting oysters in the waters of Northport Harbor in the year 1845, and has continued to plant there every year since, in water five feet in depth in-shore at ordinary tides, and from five to six fathoms deep on the outer edge of the bed. Before commencing to plant, he examined the bottom with a dredge. The ground was 500 or 600 yards in length by 300 yards in width. He took up some scollops and stones, but found no oysters. Before beginning the examination, the boundaries of the ground were marked with stakes inside and buoys on the outside. The stakes remained until the ice in winter carried them away, and in the spring they were replaced. The buoys were visible at high tide and the stakes at low tide. The in-shore line is about 110 yards off shore. Within the two years before the trial the plain-

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tiff had planted about 7000 bushels of oysters in the bed. Theodore Lowndes and James Sills lived in sight of the oyster bed and were employed to watch it. At the time the defendant took the oysters in dispute, he had notice that they had been put there by the plaintiff, who claimed them as his own. In the progress of the trial, and after the plaintiff had rested, the defendant offered to prove by the witness Israel Tilden that oysters of natural growth have been caught outside the stakes which mark the boundaries of the plaintiff's bed, and in the neighborhood, both before and since the stakes were put down, and that oysters of natural growth exist there at this time. This evidence was objected to by the counsel for the plaintiff and the objection sustained by the court, and the defendant thereupon excepted. It will be seen, upon looking further into the case, that the proposed evidence was rejected because the neighborhood was too remote from the *locus in quo*. No one disputed that oysters of natural growth exist in the waters of Long Island Sound, and the examinations of the ground made by the plaintiff, before proceeding to stake out the bed, imply that this fact was not in dispute upon the trial. The proof offered and rejected was therefore clearly irrelevant, and of no value upon the questions in issue before the jury. Testimony was offered by the defendant, and received without objection, to show that oysters of natural growth existed in the immediate neighborhood of the plaintiff's stakes, and were found within the lines of his stakes before he marked out his bed. The court charged the jury that if there was a bed of oysters growing naturally in the place where the plaintiff planted his oysters, in 1845, and he mingled his oysters with the natural produce of the waters, he did not thereby acquire an exclusive title to the mingled mass or its increase. And at the request of the defendant's counsel he also charged, that if oysters were found before the planting by the plaintiff around and immediately adjoining the bed of the plaintiff, the jury should take that circumstance into consideration in determining the question

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whether oysters of natural growth existed on the place planted by the plaintiff, at the time. The offer of the defendant to which the plaintiff objected was properly rejected, because it was too general and not sufficiently definite to be of any value in determining the issue made by the pleadings.

The two cases of *Fleet v. Hegeman*, (14 Wend. 42,) and *Decker v. Fisher*, (4 Barb. 592,) are authorities to show that oysters planted by an individual in a bed clearly marked out and defined in the tide waters of a bay or arm of the sea, which is a common fishery to all the inhabitants of the state where the bay or arm of the sea is situated, and where there are no oysters growing spontaneously at the time, are the property of the person who plants them, and the taking them by another person is a trespass, for which an action lies. It is indispensable to the existence of the right of property in oysters thus planted, that the bed shall not interfere with the exercise of the common right of fishing; for if the oysters were mingled with and undistinguishable from others, of natural growth, in the public waters, the interest of the person planting them would be subservient to the public use. The reasoning by which the court reached this conclusion will be found in the opinion of Ch. J. Nelson, delivered in the first named of these cases. It rests upon well settled principles, and need not be alluded to further. Northport Harbor, where the oyster bed of the plaintiff was located, is an indentation upon the southern shore of Long Island Sound, which, upon all the definitions, is a part of the high seas. If the jury believed the plaintiff's witnesses—and that was exclusively their province—then all the conditions required by the authorities to which I have referred, to entitle the plaintiff primarily to recover, existed, and he was entitled to a verdict; unless the defendant established the existence of some right or title in himself and others, or in those under whom he claimed, to exclude the plaintiff from the enjoyment of the oyster bed, and from appropriating a portion of the waters and bottom of the sound to the uses claimed by him. This he sought to

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do by alleging—which was not disputed—that the plaintiff was not, on the 3d day of March, 1859, the day of committing the alleged trespass, or at any time before that day, an inhabitant of the town of Huntington, in the county of Suffolk. And also alleging, which was the real point in controversy, an exclusive right of fishery in the *locus in quo*, common to all the people of the town of Huntington, of which town the defendant was a commoner, under a grant from the crown of Great Britain. The defendant produced and read in evidence letters patent, granted in the reign of William and Mary, and dated the 5th day of October, in the year 1694, executed by Benjamin Fletcher, captain general and governor &c. of the province of New York &c., to Joseph Baily, Thomas Wicks and five others, freeholders and inhabitants of the town of Huntington, which is thereby created a body politic and corporate, by the name of the Trustees of the Freeholders and Commonalty of the town of Huntington, and their successors. It recites another patent for certain lands, premises, franchises and appurtenances theretofore granted, in the reign of Charles the 2d, dated the 30th day of November, 1666, to Jonas Wood and others, in behalf of themselves and their associates, the Freeholders and Inhabitants of the town of Huntington, and their successors &c., which it ratifies and confirms. The premises mentioned and granted in both instruments are therein described as certain “tracts and necks of land lying upon our said island of Nassau, within our said county of Suffolk, bounded on the west by a river called and known by the name of Cold Spring, a line running south from the head of said Cold Spring to the South sea; and on the north by the sound that runs between our said island of Nassau and the main continent; and on the east by a line running from the west side of the pond called and known by the name of Fresh pond, to the west side of Whitmansdale or hollow, and from thence to a river on the south side of our said island of Nassau, on the east side of a neck called Sampawams; and from the said river

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south to the said South sea: together with all and singular the houses, messuages, tenements, buildings, mills, mill dams, fencings, inclosures, gardens, orchards, fields, pastures, feedings, woods, underwoods, swamps, plains, rivers, rivulets, waters, lakes, ponds, brooks, streams, beaches, quarries, trees, harbors, highways, easements, fishing, fouling, hunting, hawking, mines, minerals, &c., whatsoever to the said tracts of land within the limits and bounds next above mentioned, belonging or in any wise appertaining." Habendum to the use, benefit and behoof of the said freeholders and inhabitants respectively, in free and common socage. When the evidence was concluded, the counsel for the defendant requested the court to charge the jury, 1st. That the title to the lands under water in Northport Harbor being in the town of Huntington, the plaintiff could not recover. 2d. The inhabitants of the town of Huntington being entitled to the exclusive use of those waters, and the plaintiff being a non-resident of the town, could not recover. The court declined so to charge, and the defendant excepted.

This right of taking fish in the sea, and in the creeks and arms thereof, is common to the people of England, as a public common of piscary, and they may not, without injury to their right, be restrained thereof. And one of the points made by the counsel for the plaintiff is whether, since magna charter, "either the king or any particular subject can gain a proprietary exclusive of the common liberty." Diverse opinions have been given by the courts in this country and in England upon the subject. The weight of authority would seem to be adverse to the existence of any power in the crown to grant any such franchise. Its existence, however, has been affirmed in this court in the case of *Rogers v. Jones*, (1 *Wend.* 237.) It is manifest, however, upon looking into the opinion of Mr. Justice Woodworth, in that case, that he did not distinguish between grants by the crown alone and grants by the crown in concurrence with the legislative power of the realm expressed through an act of parliament. There

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can be no doubt of the validity of grants made by the commissioners of the land office, of lands under the tide waters of the state, to which the learned justice refers, and the more recent grants by legislative acts to particular individuals and corporations, because these are grants made by the people in their sovereign capacity, acting through the legislature. The authorities upon the question are referred to in *Angell on Tide Waters*, at page 142. It is not material for us to consider that subject further, because this case may be safely disposed of upon another ground.

The things primarily granted by the patent of the 5th of October, 1694, are therein described as "all the afore recited tracts and necks of land lying upon our island of Nassau, bounded on the west," &c., and giving as the northern boundary, "the sound that runs between our said island of Nassau and the main continent." To what line or limit does this northern boundary of the patent extend? Does it reach into the waters of the sound, and if so, how far, or does it stop at the shore? If Long Island Sound was a fresh water river, not flowed by the tide, we should know that this boundary would extend *ad filum medium aquæ*. But the sound is not a river at all, but an arm of the sea, separating the island of Nassau from the main continent, and therefore the rule in regard to fresh water rivers above tide waters does not apply. The rule I understand to be this: "A grant of land to a subject or citizen, bounded upon a fresh water stream or river, where the tide neither ebbs nor flows, extends *ad filum medium aquæ*; but a grant bounded upon a navigable river, that is, a river flowed by the tide, extends to the edge of the water only." (1 *Halstead's N. J. Rep.* 1. See also the reporter's note to *Ex parte Jennings*, 6 *Cowen's Rep.* at page 544.)

The defendant, under his 4th point, contends that the patent geographically includes Northport Harbor, because the boundary not only goes to the sound on the north, but among the things granted are havens, harbors, creeks, &c. Tho

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word creek signifies a small inlet, bay, or cove, a recess in the shore of the sea, or a river; and the words harbor and haven signify a place of shelter and protection for ships and vessels, where they may lie in safety during storms and stress of weather. The argument of the defendant proceeds upon the theory that there are no harbors, havens or creeks inside of the south shore of the sound upon the rivers or inlets, if any, which intersects the island in the town of Huntington, to which the words quoted can apply. The proof is silent in respect thereto. But there is an express limitation upon the effect of these words, in the patent itself, which declares that the havens, harbors, creeks, &c., with the other rights and franchises, are to be "within the limits and bounds next above mentioned;" that is, they are such as may be within the limits of the territory bounded north by the shore of Long Island Sound. The right of fishing in the sea is denominated a common right; that is, a right inherent in all the people of the realm, by the common law. It is one of those rights held by the sovereign power in trust for all the people. Nothing passes by grant in derogation of such rights, by implication. Grants of this description are construed strictly, and an intention to part with any part or portion of such rights will not be presumed, "unless clear and special words are used to denote it." (*Martin v. Waddell*, 16 *Peters*, 369.) In the case of *The Royal Fishery of Banne*, (*Davies' Rep.* 149,) it was resolved, "That any navigable river, so far as the sea ebbs and flows, is a royal river, and the fishery in it is a royal fishery belonging to the king by his prerogative, because such river participates of the nature of the sea, and is said to be a branch of the sea, so far as it flows." "That no part of the royal fishery could pass by the grant of the land adjoining by the general grant of fisheries, for this royal fishery is not appurtenant to the land, and general words in the king's patent shall not pass such special royalty which belongeth to the crown by prerogative." The common law rights of navigation and fishery

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are classed amongst those public rights denominated *jura publica* or *jura communia*, and thus are contradistinguished from *jura coronæ*, or private rights of the crown. They are held by the sovereign in trust for and as the representative of the 'people.'

I conclude, for these reasons, that the title to the lands under the waters of Northport Harbor in Long Island Sound is not in the town of Huntington; that the inhabitants thereof have not the exclusive right to take fish therein; and that the justice who tried this action was right in refusing to instruct the jury as requested by the defendant's counsel.

Judgment upon the verdict should be entered for the plaintiff.

[ORANGE GENERAL TERM, September 9, 1861. *Emott, Brown and Scrugham, Justices.*]

BROWN and others, *appellants*, vs. EVANS, executor, &c.
respondent.

The petition of appeal from a decree of a surrogate, on the final accounting of an executor, should name the persons who are intended to be made respondents and who are to be called upon to answer.

But where there is a defect of parties, if no motion is made, to stay or dismiss the appeal, on that ground, and the absent parties have neither taken an appeal themselves, nor applied to be made parties to the appeal which has been taken, the appellate court cannot, upon such appeal, reverse the decree appealed from, even though it should come to the conclusion that the surrogate had erred in his views of the rights of the parties.

A testator, by his will, devised as follows: "I give unto my son J. C., and to his heirs and assigns forever, all my property, both real and personal, provided he ever has any lawful heirs that shall arrive at the age of twenty-one years." "And I do further order and direct, that in case my son J. never has any lawful heirs, that shall arrive at the age of twenty-one years, that in such case all my property, both real and personal, shall be equally divided amongst my brothers' and sisters' children." *Held*, 1. That the bequest to J. C. was not a bequest of a life interest, but was a devise of the

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testator's lands in fee, and a bequest of the entire interest in his personal property, although upon a condition.

2. That the condition was not a condition precedent, but a conditional limitation, whose effect would be, not to suspend the vesting of the interest devised or bequeathed, but to divest it, and send the property over, in the event of the non-fulfillment of the condition.
3. That the absolute ownership of the property could not be determined until the event upon which the interest in the property is made by the will to depend, occurred, and that consequently the rights of the persons to whom the property was limited over did not attach, nor was the ultimate and absolute title determined, until it had been ascertained whether any children whom J. C. might have, would live to become twenty-one years of age.
4. That as J. C. might have had any number of such children, the title to the property would be suspended not only during his life, but during the lives of each one of such children who should die under the prescribed age, and until some one of them should attain that age. That consequently the limitation over was forbidden by the statute, (1 R. S. 773, § 1,) and the estates in remainder were void.

The rule is well settled that it is the character of the limitation at the time it is created, and not the event as it turns out in fact, which is to determine its validity.

If the estate created is such as by its terms to suspend the ownership of the property for more than two lives in being, it will be void, although in the subsequent history of the estate, or the parties in interest, it may happen that this limit is not exceeded.

A PPEAL from a decree of the surrogate of the county of Orange, made upon the final accounting of William Evans, the respondent, as surviving executor of Silas Corwin, deceased. The principal question, on the appeal, arose upon the construction of the will of the testator. By the first clause of such will, the testator devised as follows: "I give unto my son Jabez Corwin, and to his heirs and assigns forever, all my property, both real and personal, provided he ever has any lawful heirs that shall arrive at the age of twenty-one years." By a subsequent clause he directed and devised as follows: "And I do further order and direct, that in case my son Jabez never has any lawful heirs that shall arrive at the age of twenty-one years, that in such case all my property, both real and personal, shall be equally divided amongst my brothers' and sisters' children," as follows, viz:

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one-sixth part to his brother Ezra Corwin's children; the one-sixth part to his brother Peter Corwin's children; the one-sixth part to his brother Jabez Corwin's children; the one-sixth part to his brother Daniel Corwin's daughter, Rosetta Evans, during her natural life, and then to the heirs of her body; the one-sixth part thereof to his sister Azubah Tuthill's children, excepting out of the same a sufficiency to maintain the said Azubah comfortably during her natural life; and the remaining sixth part to his sister Mary Brown's children. The will also gave legacies of two hundred dollars to the children of each of his said brothers and sisters, except that the said Rosetta Evans was to have two hundred dollars as the sole representative of his brother Daniel Corwin. And the will also provided, that in case any of the said legatees should not be surviving when the property should be divided, their part should be paid to their heirs. Jabez Corwin, the son of the testator, died on the 26th day of January, 1858, without ever having had any lawful child.

At the time of the final accounting of the executor, each of the brothers of the testator named in the will had several children living, whose names were set forth in the petition of the executor praying for an accounting, and who were supposed to be entitled to the residue of the personal estate, after the payment of the legacies. The surrogate, by his decree, found the whole sum to be distributed to be \$11,640.95, and he ordered the same to be distributed among the several nephews and nieces of the testator, the children of his brothers and sisters, in the manner specified in the will, viz. one-sixth part to each family of children. The appellants, Silas C. Brown, Jemima Howell, Arminda Myers and Lucetta Hulse, claiming to be heirs at law of the testator, and named and described as legatees in his will, appealed from the decree; insisting that the surrogate had put an erroneous construction upon the clauses of the will above quoted, and had consequently adopted an erroneous rule for determining the rights of the persons claiming an interest in the estate. The

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petition of appeal specified several grounds of objection to the decree appealed from, not necessary to be stated. The petition did not name the individuals who were intended to be made respondents. But an order was granted, by a justice of the court, requiring "the respondent therein named" to answer the petition within twenty days after service of a copy of said petition of appeal and notice of such order. An answer to the petition was put in by William Evans, the surviving executor; in which he insisted that the decree of the surrogate was in all respects correct, and ought to be affirmed; but he alleged that the administrators of Jabez Corwin, deceased, and all the other legatees named or referred to in the will of Silas Corwin, except the appellants, ought to be made parties respondents.

Fullerton & Van Wyck, for the appellants. I. The condition annexed to the devise and bequest to Jabez Corwin, in the following words, "provided he ever has any lawful heirs that shall arrive at the age of twenty-one years," is a condition precedent. Jabez Corwin having died without ever having had any children, the condition upon which the estate was to vest in him never happened, and he therefore never took any interest or estate in the testator's property, either real or personal, under the devise and bequest in question. (1.) The condition is annexed to the gift, and defines the contingencies upon which the testator gave the property to Jabez. It is not in the nature of a limitation upon, or qualification of, any estate actually given to Jabez in the property. Jabez was not to have any estate whatever in the property, unless he should have lawful heirs who should attain the age of twenty-one years. (2.) That this was the intention of the testator is evident from the fact that the testator proceeded to make an express independent provision for the support of Jabez and his family. If he had intended that Jabez was to have the use of the property during his life, whether he had children or not, it would have

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been superfluous and inconsistent to have given the directions which are contained in the will, for Jabez to have the right to live in one of the testator's houses, and to have his firewood furnished, a cow kept on the farm for his use, and provisions furnished for his family. (*Caw v. Robertson*, 1 *Seld.* 125, 134. 2 *Story's Eq. Jur.* § 1306.)

II. Upon the death of the testator, his property vested in his brothers' and sisters' children, under the following provision of the will: "I do further order and direct, that in case my son Jabez never has any lawful heirs that shall arrive at the age of twenty-one years, that in such case all my property, both real and personal, shall be equally divided between my brothers' and sisters' children." The persons to take under the provisions of the will, were designated with certainty and precision. The estate vested in them at once, but subject to be divested upon the happening of a contingency, viz. Jabez having children who should attain the age of twenty-one years. On the happening of that event, and not till then, was the property to go to Jabez. (1.) The devise to the children of the brothers and sisters of the testator was to take effect upon the testator's death, if Jabez had no children twenty-one years old at that time. (2.) There was a failure of the condition upon which Jabez was to take the property, so long as he had no children twenty-one years of age; and the bequest over, therefore, took effect immediately on the death of the testator. (3.) It is clear that the testator intended the brothers' and sisters' children to take the property, subject only to be divested on the happening of the contingencies upon which it was to vest in Jabez, and subject also to the provision made for the support of Jabez and his wife. (4.) Where there is a failure of the condition on which personal estate is bequeathed, (as in the bequest of Jabez,) and there in a bequest over, no estate vests, and the bequest over becomes operative at once. (*Caw v. Robertson*, 1 *Seld.* 135. 2 *Story's Eq. Jur.* 130. *Stackpole v. Beaumont*, 3 *Ves.* 98. *Knight v. Cameron*, 14 *id.* 389.)

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III. Nothing is given to the children of Jabez, (if he should have any.) If the devise was to take effect at all, it would only take effect in favor of Jabez himself; and if he died before it vested, (that is, before he had children twenty-one years old,) the devise to him failed utterly. The will does not give the property to Jabez for life, and if he leaves children at his death who should attain the age of twenty-one years, then to such children; but it gives it to Jabez himself in fee, on condition of his having children who should attain the age of twenty-one years. The words, "and to his heirs and assigns forever," in the devise to Jabez, were words of inheritance and description of the estate merely, and not words of purchase. If Jabez had died leaving children all under twenty-one, the estate would not pass to such children on their attaining that age after their father's death.

IV. If we are right in regarding the condition annexed to the gift to Jabez as a condition *precedent*, or if the property vested in the brothers' and sisters' children, subject to be divested on the happening of the contingencies, in either case there was no suspension of the absolute power of alienation for a longer period than during the life of Jabez—one life in being at the time of the creation of the estate

V. If the court should be of opinion that, under the devise and bequest to the children of the brothers and sisters of the testator, the property did not vest in them until the death of Jabez, then we admit that there is an implied valid direction to the executors to hold the property in trust during the lifetime of Jabez, (or until he should have children twenty-one years old,) and out of the income of the property to provide for the support of Jabez and his family as directed in the will; and upon the death of Jabez, without children, the property of the estate, including the unexpended interest, as well as the principal then remaining in the hands of the executors, passed to the children of the brothers and sisters of the testator. This was not a direction to accumulate the income of the funds. The executors might have expended

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the whole income in the support of Jabez and his family, if they had deemed it necessary to do so. Not having expended the whole income, the surplus was a portion of the testator's estate, and passed under the will to his brothers' and sisters' children.

VI. The executors have not appealed from the surrogate's decree, and are therefore not entitled to ask to have the devise over to the children of the brothers and sisters of the testator declared void. Neither have the administrators of Jabez Corwin appealed.

J. W. Gott, for the respondents. I. The devise to Jabez Corwin vested in Jabez the whole of the real and personal estate of the testator, subject to be divested by his dying without having a lawful heir that attained the age of twenty-one years, and the interest of the personal property of the testator, during the lifetime of Jabez, belonged to him, and went to his administrators after his death. The rule of construction applicable to this case is expressed in 1 *Roper on Leg.* 571, 2d *Am. ed.*, substantially as follows, viz: Where a devise of real estate is to one, *provided* he attains the age of twenty-one, and such devise is accompanied with a limitation over, that in case the devisee dies under twenty-one, then over, the subsequent limitation is considered explanatory of the sense in which the testator used the preceding words, and as showing the event on which the estate was to go over to the ulterior devisee. The contingency, in such cases, is held not to constitute a condition precedent, making the vesting depend on the devisees attaining the specified age, but the estate is held to vest instantaneously, subject to be divested on the happening of the contingency. The same rule is applicable to a devise where real and personal estate are blended. (*See cases cited*, 1 *Rop. on Leg.* 571; *Id.* 600, 601; *Daniel v. Warren*, 2 *Yo. & Coll.* 290; *Deane v. Test*, 9 *Ves.* 147, 152; 2 *P. Wms.* 419; 1 *Bro. C. C.* 81; 3 *Mer.* 335.)

II. The interest of the personal estate of the testator, dur-

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ing the lifetime of Jabez Corwin, belonged to him as the sole child and next of kin of the testator, and his administrators are now entitled to receive it. By the provisions of the will, the estate could not be divided amongst the devisees and legatees to whom it was given over, until after the death of Jabez without issue, or if he had a child or children, till after the death of such child or children under the age of twenty-one years. In the meantime, the interest accruing on the personal estate, (in case it was not given to Jabez, as alleged in the 1st point,) must necessarily accumulate, contrary to the provisions of sections 3 and 4, title 4, chap. 4 of the 2d part of the revised statutes. It is entirely clear, that if the will had *expressly* provided that this interest should accumulate for the benefit of the legatees over, till the happening of the event on which they were to take, the provision would have been void, and Jabez would have taken the interest during his lifetime as next of kin. The *implied* direction in the will, to accumulate this interest, is as effective as an express one would have been. (*Vail v. Vail*, 4 *Paige*, 317, 330, &c. *S. C.*, 7 *Barb.* 226, 239.) The interest in question not being legally disposed of by the will, (unless it was therein given to Jabez,) was properly decreed by the surrogate to have belonged to Jabez Corwin as next of kin of the testator, and to be paid to his administrators.

The above points have been framed upon the presumption that the devise over to the brothers' and sisters' children of the testator is valid, as to the principal of the personal estate of the testator, and are intended to sustain the surrogate's decree. But the counsel of the executor having arrived at the conclusion that the devise over is wholly void, and that the decree of the surrogate should be set aside, and the whole of the personal estate of the testator be paid over to the administrators of Jabez Corwin, presents the following points to the court, viz.

III. The devise over, contained in the will in question and set forth in the first point, is utterly void, being in violation

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of our statutes concerning the suspension of the power of alienation of real estate and the accumulation of personal property. By section 1, title 4, chap. 4, part 2 of the revised statutes, it is provided that the absolute ownership of personal property shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives *in being* at the death of the testator. Although, in point of fact, Jabez Corwin died without ever having had any children, yet he *might* have had any number of children, within the limits of nature, born *after* the death of the testator. If he had had children, there could have been no division and distribution of the estate amongst the legatees over, till after the death of all of such children under the age of twenty-one years, and the absolute ownership of the property would have been suspended until that time. There would have been, under such circumstances, a suspension of the ownership of the property for the life of Jabez, (a life in being at the death of the testator,) and for an uncertain number of lives, (viz. of the *possible* children of Jabez,) *not* in being at the death of the testator. Such a limitation is entirely inconsistent with the provisions of the statute referred to. It is well settled, that if the limitation be not such that it *must* take effect, if at all, within the time prescribed by law as the proper limit, it is void. It is not enough that it turns out that the estate is alienable within the proper period. It must be made so by the will, and not be the result of chance. The *possibility*, at the creation of an executory limitation, that the event on which its existence depends may exceed, in point of time, the limits allowed, vitiates it *ab initio*. (*Hawley v. James*, 16 *Wend.* 121. *Tayloe v. Gould*, 10 *Barb.* 398. *Hannan v. Osborn*, 4 *Paige*, 342. 4 *Cruise*, 449. 4 *Kent's Com.* 297, 8th ed. 8 *Ves.* 23. 2 *Mod.* 289. 2 *H. Black.* 358. *De Barante v. Gott*, 6 *Barb.* 492. *Yates v. Yates*, 9 *id.* 346.) A gift in remainder expectant upon the death of unborn

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children, is too remote. (7 *Paige*, 222, 521. 4 *Kent's Com.* 297, note a. *Fearne on Ex. Dev.* 159, 160.)

IV. The devise over is void, because the illegal accumulation of interest, mentioned in the 2d point, is by the will mingled with the residue of the estate. This vitiates the whole executory devise. (*King v. Rundle*, 15 *Barb.* 145. *Hawley v. James*, 5 *Paige*, 318. 16 *Wend.* 61. *Haxtun v. Corse*, 2 *Barb. Ch. Rep.* 506. *Dekay v. Irving*, 5 *Denio*, 646.)

By the Court, EMOTT, J. This is an appeal from a decree of the surrogate of Orange county, made upon the final accounting of the respondent as executor of Silas Corwin. The principal and indeed the only particular in which the decree is complained of, as I understand the papers submitted to us, is the rule adopted by the surrogate as to the rights of the parties interested or claiming an interest in the estate, and the construction of the will of Silas Corwin upon which that rule is based. Our attention is not called to any allowance made to the executor in the settlement of his accounts, or any decisions of the surrogate which are claimed to be erroneous, independent of those that followed from the construction which he gave to the will of the testator.

The petition of appeal is informal in not naming the parties who are to be made respondents, and who are to be called upon to answer. The proceedings are defective, because all the parties who are interested in sustaining the decree are not made respondents, and are not before the court. The administrators of Jabez Corwin, at least, should have been parties to this appeal, since the reversal of this decree would affect them seriously, much more so than the executor of Silas Corwin, because his interest in respect to the disposition of the residue extends only to be protected in whatever payments he may make. In the answer of the executor, who is the only respondent to the petition of appeal, the defect of parties which thus exists is brought to the notice of the

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court. No motion, however, has been made to stay or dismiss the appeal, nor have the parties who are now absent either taken an appeal themselves, although the counsel for the executors complains of the decree as not sufficiently favorable to them, or applied to be made parties to the present proceeding.

The result is, that if upon examination we had come to the conclusion that the surrogate had erred in his views of the rights of these parties, we could not upon the present appeal reverse his decree, nor disturb the adjudication which has been made as to the rights and interests of the administrators of Jabez Corwin and others, until they should be made parties to the appeal. The rule as to the parties and the correct method of procedure in such cases will be found stated by the chancellor in *Gilchrist v. Rea*, (9 *Paige*, 66.) See also *Gardner v. Gardner*, (5 *id.* 170;) *Kellett v. Rathbone*, (4 *id.* 102, 107.)

An examination of the case, however, shows that no error has been committed in the particulars specified, of which the appellants can complain; and as the other parties have shown no disposition to disturb the decree, we ought not to refuse to affirm it, to enable them to come in and raise new questions.

The bequest to Jabez Corwin contained in the will of Silas Corwin is not a bequest of a life interest, as is supposed by the counsel for the appellants. It is a devise of the testator's lands in fee, and a bequest of the entire interest in his personal property, although upon a condition. If the construction of this condition, which was contended for by the respondent's counsel in one part of his argument, and which seems to have been adopted by the surrogate, be correct, it is not a condition precedent, but a conditional limitation, whose effect would be not to suspend the vesting of the interest devised or bequeathed, but to divest it, and send the property over, in the event of the non-fulfillment of the condition. The counsel for the appellants, on the other hand, contends that the clause in question constituted a condition precedent, and

that until its fulfillment no estate or interest vested in Jabez Corwin, and that the rights of the appellants depend wholly upon the devises and bequests over to them in the event of the failure of the estate of Jabez Corwin, by the non-fulfillment of the condition upon which that estate depended. In no aspect, however, can Jabez Corwin be said to have taken a life estate with remainders over, for there is no devise or bequest to his children, if he should have any; and the question of title or ownership lies wholly between him or his representatives on the one hand, and on the other, the devisees or legatees to whom the property is given, if it did not vest in him or become divested, among whom are the present appellants. If the provisions of the will and the limitations of the testator's property which it contains are valid, either the one or the other of these classes of persons take the absolute interest in this property, in the event upon which that interest is made by the will to depend.

It follows that the absolute ownership of the property could not be determined until that event occurred, and we thus encounter the question raised by the respondent's counsel, whether it must occur within the period allowed by the statute. (1 R. S. 773, § 1, *tit.* 4.) The cases cited by the counsel for the respondent establish, and the rule is undoubtedly well settled, that it is the character of the limitation at the time it is created, and not the event as it turns out in fact, which is to determine its validity. If the estate created is such as by its terms to suspend the ownership of the property for more than two lives in being, it will be void, although in the subsequent history of the estate or the parties in interest it may happen that this limit is not exceeded.

The devise and bequest to Jabez Corwin in this case is of the entire property, "provided he ever has any lawful heirs that shall arrive at the age of twenty-one years," and the rights of the appellants do not attach, nor is the ultimate and absolute title determined, until it has been ascertained whether any children which Jabez Corwin might have would

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live to become twenty-one years of age. As he might have had any number of such children, the title to the property would be suspended, not only during his life, but during the lives of each one of such children who should die under the prescribed age, and until some one of them should attain that age. If Jabez Corwin had three children, the title to this property might not vest either in him, or in the residuary legatees, until all these children should die; for if the first two should die under twenty-one, the title would still hang suspended upon the possible duration of the life of the third; and so of any number. The statute forbids the creation of such a limitation, and the estates in remainder under which the appellants claim are consequently void.

There is, therefore, no error in this decree, of which these appellants can complain. The error, if any, has been made against the persons who are not parties to this appeal, and who have not themselves appealed from the decree. The present respondent is not in a condition to raise the question of such an error, or to ask us to modify the surrogate's decree according to the views we have now indicated, because he has neither appealed nor set up or alleged any errors in the decree, in his answer to the present petition of appeal, as he might probably have done under the 44th rule of the court. His answer to the appeal is that the decree is in all respects correct, and he cannot now be heard to complain of it.

The decree appealed from is therefore affirmed, with costs to be paid by the appellants.

[ORANGE GENERAL TERM, September 9, 1861. *Emott, Lott, Brown and Scrugham*, Justices.]

MILBURN *vs.* BELLONI and others.

Where a general agent, who is authorized and accustomed to make sales for his employers, of the articles in which they are dealing, gives a warranty as to the character of property sold by him, his employers are bound thereby.

Even if such agent exceeds his positive authority or instructions, in giving a warranty, upon making a sale, if the purchaser has no information of the fact, he will not be prejudiced.

Where, upon a sale of a quantity of coal dust, the vendors' agent gave a warranty that it had no dust of soft or bituminous coal mixed with it, it was *held* that, although the purchaser stated that he was purchasing the coal dust for the purpose of making brick, the vendors could not be held liable in an action on the warranty, upon any implied warranty that the article was suitable for the purpose for which it was purchased, or for any thing beyond the express agreement of their agent that it was the dust of hard coal, exclusively. And that the true rule of damages in such action was the difference between the value of the article as it was, and its value as it would have been, had it been what it was represented to be.

A purchaser has no right to proceed without inquiry or examination, and use an article which will damage his business, relying upon a warranty which only goes to the nature or character of the article, and not to the effect of using it, and then hold the vendor responsible for the remote consequences of his own action.

APPEAL by the defendants from a judgment entered upon the report of a referee. The action was for damages occasioned by a breach of a warranty, in respect to the character of coal dust purchased by the plaintiff, for the purpose of using it in making brick: the warranty being that the dust was free from soft coal, and the breach alleged the contrary. The warranty alleged was, that "the coal dust consisted of the dust of hard coal, free from admixture with any soft coal dust." The price paid was \$37.50. The coal dust so sold to the plaintiff was, at the time of the sale, in sight, and pointed out. The plaintiff was at the time a manufacturer of brick, and had been such seven years. He was admitted to testify as an expert, as to the effect of the use of soft coal in the manufacture of brick.

The sale to the plaintiff was made by a person named French, the foreman and general agent of the defendants, at

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a yard not used as a "*sales-yard, but for storage and delivery.*" He had charge of one of the yards, and was in the habit of making sales from the yard, occasionally. The referee found, as facts, that in the month of June, 1858, the plaintiff called at the coal yard of the defendants, in the city of New York, and inquired if they had hard coal dust for sale unmixed with soft coal dust, and stated that he would not have it if it had any soft or bituminous dust in it; at the same time saying if it had, it would damage or break his brick; that the defendants did thereupon sell and deliver to the plaintiff fifty tons of coal dust, and warranted that it had no soft or bituminous coal in it; and that the coal dust so sold to the plaintiff had soft or bituminous dust mingled with it; that the plaintiff did not discover the intermixture of soft coal in that which he so purchased of the defendants, until he began to take down the kilns of brick for market that were made with the said dust, and that at that time he had used the said dust so purchased in making brick on his yard, except one ton; that a person not a dealer in coal, or not accustomed to the use of soft or bituminous coal dust, would not readily detect its presence when mixed with hard coal dust; that the brick of the plaintiff so made of the said coal dust were greatly injured by the soft coal dust mixed with it; and that the plaintiff had sustained damage from such injury to the amount of six hundred and fifty dollars. And the referee ordered judgment in favor of the plaintiff against the defendants, on account of said damages, for the sum of six hundred and fifty dollars with costs.

Beebe, Dean & Donohue, for the appellants. .

D. C. Ringland, for the respondent.

By the Court, EMOTT, J. The person in the employ of the defendants, who made the sale of coal dust to the plaintiff, was authorized to make such a sale in the course of the

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business of the defendants, and they are bound by the warranty given by him in the transaction. He was a general agent of the defendants, constantly in their employ, having charge of one of their yards, and accustomed, at least occasionally, to make sales from their yard. His authority and general employment were recognized by one of the defendants, who came into the yard before this transaction was completed, and allowed or directed him to make the sale, as well as by the subsequent ratification of the act. Even if, as an agent for selling, he exceeded his positive authority or instructions, in giving a warranty, as no information to that effect was given to the plaintiff, the latter cannot be prejudiced by the fact, if it exist. This was not a special agency for this particular transaction, but a general agency in the business of the defendants to make sales of the articles in which they were dealing, and the rule of law as to such agents, in the particular now under consideration, is undisputed.

The referee finds that the defendants' agent warranted "or promised that the coal dust which he sold to the plaintiff had no dust of soft or bituminous coal mixed with it." This is the only warranty proved, and upon this alone, or for its breach, the action is brought. It is true that the evidence establishes, and the referee finds, that the plaintiff stated that he was purchasing the coal dust for the purpose of making brick, and that soft coal dust would not answer that purpose, and would destroy or injure the brick if it should be used. But he did not ask nor receive a warranty that the coal dust was fit for this business, nor any other warranty than that it contained no soft or bituminous coal. It was a sale of an existing article, and not a contract for its manufacture. There is in such a case no implied warranty, such as will arise in some cases where an article is ordered of a manufacturer for a special purpose. The distinction is well illustrated in an observation of Mr. Justice Maule, in the course of the argument in *Keates v. Cadogan*, (2 Eng. L. and Eq.

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320,) which is often quoted. "If a man says to another, 'sell me a horse fit to carry me,' and the other sells a horse which he knows to be unfit to ride," or, it might be said, upon that, sells a horse which is unfit to ride, thus representing the fact to be otherwise, "he may be liable for the consequences; but if a man says, 'sell me that gray horse to ride,' and the other sells it, knowing that the former will not be able to ride it, that would not make him liable." The defendants in the present case cannot be held upon any implied warranty that the article was suitable for the purpose for which it was purchased, or for any thing beyond the express agreement of their agent, that it was the dust of anthracite coal exclusively. It will be remembered that the suit is upon a warranty, and not for fraud, and depends altogether upon a breach of a positive agreement.

This is, indeed, as has been already observed, the finding of the referee. The warranty which he determines to have been made and broken, was a warranty that the article was free from soft coal, and not that it was fit for use in making brick. But the rule of damages which was applied referred to a warranty of the latter description, that is, a warranty of the fitness of the article for the purpose to which it was to be applied. If we lay out of view all which occurred between these parties at the time of the sale, in reference to the intended use of the article, as immaterial to the legal aspect of the case, it will become very obvious that the true rule of damages for a breach of the warranty which was actually given, would have been the difference between the value of the article as it was and its value as it would have been, if it had been what it was represented to be. The defendants are not responsible for the consequences of an improper use of the article they sold; because they simply agreed that it was a certain thing, and not that it was fit for a certain purpose. The rule is well laid down in the case of *Hargous v. Ablon*, (5 *Hill*, 472, and 3 *Denio*, 406.) But the referee has applied a different rule. He has in fact decided that one

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kind of warranty was given, and proceeded to award damages for the breach of another and a different one. The injury which the plaintiff sustained in his kiln of brick, was not the consequence of the fact that the dust which he bought contained bituminous coal, but of his making use of the dust when it contained that ingredient. It was his duty to have ascertained that fact before using the article. He had no right to proceed without inquiry or examination, and use an article which would damage his business, relying upon a warranty which only went to the fact of the nature or character of the article, and not to the effect of using it, and still hold the defendants responsible for the consequences of his acts. The warranty was broken immediately upon the sale; the fact could then have been known, and the damage, if any, ascertained and demanded. The plaintiff cannot now hold the defendants responsible, under this warranty, for the remote consequences of his own subsequent action. His recovery, under these pleadings and proofs, should have been limited to the difference between the value of the article sold him as it was, and its value as it would have been, if it had been such as it was represented, and to that value generally, and not for a particular use or purpose.

As the referee erroneously applied a different rule of damages, the judgment entered on his report must be reversed, and a new trial at the circuit ordered; the costs to abide the event.

[ORANGE GENERAL TERM, September 9, 1861. *Emott, Lott, Brown and Scrugham*, Justices.]

HATFIELD *vs.* REYNOLDS and wife.

When one employs an attorney to loan money for him, and to take a bond and mortgage from the borrower, and after the loan is made, he intrusts the attorney with the possession of the bond and mortgage, and permits him to receive payments upon it, from time to time, and to indorse them for the mortgagee, until payments are made which extinguish the principal, the attorney will be held to be, in fact and in law, authorized to receive the latter as well as the former payments; and in case of his omission to pay over the money to his principal, any loss consequent upon his insolvency must fall upon the mortgagee, rather than upon the mortgagor.

APPEAL by the defendants from a judgment ordered at a special term, for the foreclosure of a mortgage and sale of the premises. The facts material to be known are stated in the opinion of the court.

By the Court, EMOTT, J. The plaintiff, Hatfield, employed Charles A. Purdy, who was an attorney at law, to make a loan to the defendant Reynolds, and to take the bond and mortgage upon which this action is brought. Reynolds never had any negotiation or intercourse with Hatfield, and seems not even to have known him personally, until several years after the mortgage had been made; although he was of course aware that a man named Hatfield was his creditor. The bond and mortgage were left in Purdy's possession, and continued in his possession until his death. He received the interest regularly and paid it over to the plaintiff, and at length Reynolds paid the principal also to Purdy. Purdy neglected to pay over the principal to Hatfield, or even to apprise him of its receipt. Purdy died insolvent, and a loss must consequently result to one or the other of these parties. The question here is upon which the loss must fall.

The judge before whom the cause was tried finds that the bond and mortgage were left with Purdy for safe keeping; and this is expressly stated by Hatfield, and was evidently, from the facts of the case, one object at least of the deposit. The judge also finds that these securities were not left with Purdy for the purpose of collecting the principal or interest,

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and that Purdy in the matter of the payments of Reynolds acted as the agent of the latter, and was not the agent of Hatfield nor acting by his authority.

In *Williams v. Walker*, (2 Sand. Ch. Rep. 325,) Asst. V. Chan. Sandford held that where a scrivener or attorney makes a loan, and afterwards retains possession of the securities, and receives payments, indorsing them upon the bond, which he exhibits to the debtor, so that the latter is aware of its possession, the attorney is the agent of the creditor, and the payments are good. But that after the attorney ceased to have possession of the bond, his authority to receive payment ceased, and payments made after that time cannot be allowed. The opinion of the assistant vice chancellor contains a clear and full summary of the cases, and they establish the propositions that when an agent employed to take a bond or other security for money is not intrusted afterwards with its possession, he is not authorized to receive payments upon it; and contrariwise, if such agent is intrusted with the continued possession of the bond or evidence of debt, authority for him to receive payment may be implied. So the rule is stated in the text books. (*Paley on Agency*, 274. *Story on Agency*, §§ 98, 104.) There is no difference, in this respect, in this country at least, between bonds and mortgages and other obligations for the payment of money. We regard the mortgage as collateral to the bond, as a security for the money only, and we do not require a release or reconveyance of the estate, in order to the extinguishment of the mortgage.

The distinction between the case at bar and that of *Williams v. Walker*, as well as the others cited by the assistant vice chancellor, is supposed to consist in the fact that in the present case the defendant Reynolds made his payments to Purdy without calling for the production of the bond and mortgage, or verifying the fact that they were in Purdy's possession.

This presents the question whether, in such cases, the

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authority to receive payments is implied from the possession of the securities, or from their production and exhibition to the debtor at the time of the payment. In this case the plaintiff left his bond and mortgage with Purdy for safe keeping, he says, but he certainly permitted it to remain for other purposes; because he allowed payments to be made upon it to Purdy, and he received the amount of these payments from Purdy, and suffered him to indorse them upon the bond. It can hardly be deemed that from these facts, coupled with the circumstances attending the origin of the bond and mortgage, authority to Purdy to receive payments would be implied. I do not perceive that if the defendant had taken the precaution to call for the production of the papers whenever he made a payment, he would have strengthened this implication. The authority is implied from the possession of the papers, and the continued receipt of money upon them, which are facts, and not from the exhibition of the papers by the agent, which is only the evidence of the facts. It is not that Hatfield is estopped to deny Purdy's authority by Purdy's act in exhibiting or verifying it. To have called for the bond and mortgage, under the circumstances of this case, would have been a very prudent and proper precaution, but it would have been only a precaution. It would have enabled the defendant to verify the authority of Purdy, but it would have been no more than verifying it. By neglecting to do so, the defendant took the risk of making a payment after Purdy's authority had ceased, by his ceasing to have possession of the securities; and the case of *Williams v. Walker* is an authority that such a payment would be ineffectual. The observations of the assistant vice chancellor in that case go to the farther point which we have now presented, but which was not necessarily before him, that the payments would be justified while the possession continued, though the debtor were ignorant of its continuance. As the fact is distinctly shown in this case that Purdy, after having been employed to make the loan, was intrusted with the pos-

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session of this bond and mortgage, and was permitted to receive payments upon it, and to indorse them for the plaintiff, until and at the time when the payments were made which extinguished the principal, we are of opinion that he was in fact and in law authorized to receive the latter as well as the former payments, and that the loss consequent upon his embarrassments and insolvency must fall upon the plaintiff who first employed and continued to trust him.

This judgment must therefore be reversed, and a new trial ordered at the circuit, with costs to abide the event.

[ORANGE GENERAL TERM, September 9, 1861. *Emott, Brown and Scrugham*, Justices.]

 SCHLUSSEL vs. WILLETT, Sheriff &c., and others.

Where a sheriff seizes, by virtue of an attachment, property claimed by a third person under an assignment from the defendant in the attachment, and judgment is subsequently recovered in the attachment suit, by the plaintiffs therein, the sheriff and such plaintiffs, when sued for the property so seized, may show in their defense that the alleged assignment was fraudulent and void.

And where, on the trial of such an action, it was admitted by the plaintiff that judgment had been previously recovered against the defendant in the attachment suit, it was held that this was a proper case, after the evidence was in without objection, for disregarding the omission to *plead* the recovery of the judgment; it not being a variance by which the plaintiff was misled.

A provision, in an assignment made for the benefit of creditors, authorizing the assignee to "manage and improve" the assigned estate, renders the assignment on its face fraudulent and void.

APPEAL from a judgment entered upon the verdict of a jury. The action was brought by the plaintiff as assignee of Michael Mayer, in an assignment made by the latter for the benefit of creditors. It was brought against Willett as sheriff of the city and county of New York, to recover the possession of certain goods claimed by the plain-

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tiff to belong to him as assignee. Abraham S. Herman and Moses S. Herman were also made defendants. The defendants, in their answer, justified the taking of the property by Willett, by virtue of an attachment in favor of the Hermans against Mayer. The answer did not allege the recovery of any judgment, in the attachment suit. At the trial it was proved by the defendants that judgment was entered in the action in favor of the Hermans, against Mayer, for the sum of \$1194.88, April 3, 1858, which was subsequent to the commencement of this action but before trial; and that the plaintiff replevied the goods attached, by and through one of the coroners of the city and county of New York. The plaintiff also put in evidence the assignment of Michael Mayer to him, dated November 9, 1857. It contained a clause by which it was declared to be "*upon trust to manage and improve, sell, assign, dispose of, collect, receive and convert into money all the said assigned and transferred property,*" and to pay and apply the moneys thence arising, after paying the expenses of the assignee, in the manner therein specified.

It being suggested to the court that the plaintiff based his title to the property in the complaint mentioned, upon the said assignment, and that the defendants claimed that said assignment was fraudulent and void as against the creditors of the assignor, and that the defendants *Abraham Herman* and *Moses S. Herman* were such creditors at the time of said assignment, and that the attachment under which the sheriff acted was regularly issued, as set forth in the answer, the plaintiff, to enable the defendants to make a motion to dismiss the complaint, rested his case. The defendants then moved for a dismissal of the complaint, on the ground that the assignment was fraudulent and void, for the following reasons: 1. The assignment empowers the assignee to transfer the trust, and appoint new trustees. 2. The assignment confers the trust on the executors, administrators and assigns of the assignee. 3. The assignment virtually gave the assignee power to sell on credit. 4. The assignment author-

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izes the assignee to manage and improve the assigned property according to his discretion, and is equivalent to giving the assignee power to carry on the business of the assignor, and to delay selling the property indefinitely. 5. The assignment gives the assignee power to compound and compromise the debts of the assignor. 6. The assignment fails to provide for all the debts of the assignor, and the debt due to the defendants Abraham S. Herman and Moses S. Herman, on which the attachment was issued, is wholly unprovided for in said assignment. 7. The assignor, by not providing for the payment of all his debts in the assignment, has reserved to himself whatever surplus there may be, without providing for the said debt due to said Hermans. 8. The said assignment is fraudulent and void on its face.

The court granted the motion to dismiss the complaint, to which the plaintiff excepted. The property mentioned in the complaint having been delivered to the plaintiff, the court directed that the defendants have judgment for the return thereof, or for the value thereof—the value not to be assessed beyond the extent of the defendants' special interest therein, under the attachment, with damages for its detention. Testimony was then given as to the value of the property.

The justice then charged the jury, and directed them to bring in a sealed verdict. The jury rendered a verdict for the defendants, and assessed the value of the property at \$1194, and assessed the damages which the defendants had sustained by reason of the taking, detention and withholding of said property, at \$115.56. Judgment was perfected and docketed April 9th, 1859, for the sum of \$1542.94, and the plaintiff appealed therefrom.

A. R. Lawrence, jun., for the appellant.

Brown, Hall & Vanderpoel, and *S. L. Hull,* for the respondents.

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By the Court, LEONARD, J. The proceeding by attachment under the code is *in rem*, and is collateral and auxiliary to the action. The warrant authorizes the seizure of the property of the defendants therein, and creates an inchoate lien thereon. Such lien would be useless, as a remedy, if it cannot be defended against false or fraudulent claims made by third parties. It is said that the attaching creditor, having no judgment, does not stand in a position to resist the claims of a fraudulent purchaser from the defendant in the attachment. If so, the remedy is useless as a means of securing the debtor's property to answer the judgment which may be recovered in such action, (§ 232,) where the debtor has transferred it to a fraudulent vendee. Section 232 also directs the sheriff to proceed in the manner required of him by law in case of attachments against absent debtors. Under the provisions of the revised statutes there referred to, in case the property of the debtor seized shall be claimed by any other person, the sheriff shall call a jury and try the validity of the claim, and if found in favor of the claimant, the sheriff shall deliver the property to him, unless the attaching creditor shall indemnify the sheriff. In case the indemnity is given, then the sheriff must detain the goods. It seems very inconsistent and unreasonable that the sheriff should be required to hold the property so attached, after a trial before a sheriff's jury and a verdict in favor of the claimant, if, when a like question is raised at the circuit or elsewhere in a court of record, the sheriff shall not be permitted to assail the bona fides of the title of the claimant. Is he permitted or required to attack the claimant's title in certain tribunals for some purposes only, but not in other tribunals where the whole merits can be finally adjudged?

There are many other strong grounds for maintaining the right of the sheriff, or the attaching creditor, to contest the title to property of those claiming by transfer from the debtor in the attachment proceedings. The right of trustees, appointed under the revised statutes, in attachment proceed-

ings against absconding, concealed or non-resident debtors, to invoke the aid of a court of equity against all parties claiming through an alleged fraudulent title derived from the debtor, has often been maintained, although the attaching creditor could prove a demand existing only by simple contract.

That proceeding is taken for the benefit of all creditors who come in and prove their demands against the debtor in the attachment, and in that respect is unlike the proceeding authorized by the code; but I am unable to perceive that this circumstance makes any difference in the application of the principle.

Had there been no prior decision of the supreme court on this question, I should not hesitate to uphold the decision of the learned judge who presided in this case at the circuit. The case of *Hall v. Stryker*, (9 Abb. 342,) decided by a very eminent justice of this court, is adverse to these views, and in a case in all respects similar I should defer to that decision, to avoid a conflict of judicial authority.

At the trial of this action it was admitted by the plaintiff that judgment had been recovered a year previously, by the attaching creditors, against the debtor, in the same action wherein the warrant of attachment, which was relied on as a link in the defense of this action, was granted. No objection was made by the plaintiff to the introduction of this evidence. It was not a variance by which the plaintiff was misled. It was a proper case, after the evidence was in without objection, for disregarding the omission to plead the recovery of the judgment, under the authority of section 170 of the code. The court evidently so considered it. If I do not mistake, the justice presiding at this trial was a member of the general term which pronounced the judgment in *Hall v. Stryker*. The defendants might have set up this judgment before the trial, by a supplemental pleading, by leave of the court. But it is quite apparent that the plaintiff was aware of its

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existence, and was not surprised by the evidence, candidly admitting it without objection.

This fact being fairly before the court, the ground of the objection raised on the authority of *Hall v. Stryker* is obviated.

The trust assignment for the benefit of creditors, under which the plaintiff claimed title to the property in question, derived from the debtor in the attachment, authorized the assignee to "manage and improve" the assigned estate.

This provision renders the assignment, on its face, fraudulent and void.

The judgment should be affirmed with costs.

[NEW YORK GENERAL TERM, September 16, 1861. *Clerke, Ingraham and Leonard, Justices.*]

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THE PEOPLE, *ex rel.* Thomas Crimmins and Fred'k Schaefer,
vs. THOMAS McMANUS and DANIEL GALLAGHER.

Where one, who is an inspector of elections for common schools, in one of the ward districts in the city of New York, is a candidate for the office of trustee of common schools in that ward, his office as an inspector becomes vacant, and it is irregular for him to act as such.

But if there are two lawful inspectors, they are competent to act, without him, and the fact that his office was vacant will not render the proceedings of the other two inspectors, or the ballots of the voters, invalid.

Where, at an election for trustees of common schools, in the city of New York, ballots were headed or designated for "trustees of *public* schools," instead of *common* schools, as the office is called in the statute; *it was held* that the *intention* of the voters was fully manifested; there being no trustees to be voted for at that election, except trustees of common schools.

Held also, that the intention of the voters was not here a question of fact, for the jury, but of law, for the court; and that, as matter of law, the candidates receiving ballots thus headed were entitled to have them counted.

The statute requiring the ballots to be indorsed in a particular manner is directory, only, and not imperative; and there is no nullifying clause, in case the direction of the statute in this respect be omitted.

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Where there is no evidence to show that relators, claiming to have been elected to an office, were ever notified of their election, the objection that they have not taken the oath of office is not tenable.

AT the charter election in the city of New York on the 4th day of December, 1860, the relators and the defendants were severally candidates for the office of trustee of common schools in the 19th ward, and were voted for by the electors in that ward. Two trustees were to be elected for the full term; the only other candidates for the same office were Henry J. Armstrong and Herman Goebel. In the third election district, the relators Thomas Crimmins received 41 votes and Frederick Schaefer 43 votes, by a printed ballot, which designated them for *trustees of public schools*. In the fourth district of this ward the same designation was employed upon ten ballots, which gave the relators each ten votes. Five other ballots were cast in the same district with the like designation, but without the superscription "No. ten" on the outside, to indicate the ballot box to which they belonged. These ballots gave the relators five votes each. All of the ballots thus indorsed "public" instead of "common" schools were, on motion, ordered to be counted as "*scattering votes*" by the city canvassers, on the 15th day of December, 1860. By the rejection of these ballots, Thomas Crimmins lost 56 votes and Frederick Schaefer 58 votes. Had these votes been allowed, Crimmins would have been entitled to a certificate of his election as trustee of common schools for the 19th ward, for, upon the count, as it would then stand, as made by the city canvassers, Thomas Crimmins would have been allowed 895 votes, Thomas McManus 893 votes, Frederick Schaefer 888 votes, and Daniel Gallagher 840 votes.

It appears by the proof that Daniel Gallagher, one of the defendants, officiated as an inspector of election in the 2d district of the 19th ward at the election in question, and for this reason it was claimed the election, as to the 2d district, was a nullity, because he ceased to be an inspector when he

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became a candidate for trustee. In this district, McManus received 267 votes, Gallagher 217 votes, Crimmins 198 votes, and Schaefer 195 votes, as admitted in the answer. If the votes of the 2d district are disallowed, then without counting the rejected votes in the 3d and 4th districts, the result will show that Crimmins received 641 votes, Schaefer 635 votes, McManus 626 votes, and Gallagher 623 votes, thus electing both of the relators.

The defendants received the certificate of election allowed to the successful candidates, after having been declared elected by the city canvassers, and have taken the oath of office prescribed by law. This action was brought to test the right of the defendants to hold such offices and to oust them therefrom, and to establish the right of the relators thereto. Upon the trial of the action the plaintiffs recovered a verdict, and the exceptions taken by the defendants to the rulings and decisions of the court were, by an order made, to be heard in the first instance at the general term of this court.

D. B. Taylor, for the relators. I. The rejected ballots contained the proper outside indorsement, "school officers," but the city canvassers disallowed them, because the inside designation of the office for which the relators were named as candidates, was "for trustees of public schools" instead of "for trustees of common schools." The relators were prominent candidates in the 19th ward for the office of trustee of common schools. There were but six candidates voted for: all of the other ballots contained the proper heading. The ticket in question was made up, as testified to by Levinger, to improve upon the other three tickets. McSpeddon called it the German ticket. There was no misspelling of the names of the relators, which required extrinsic evidence of the elector's intention. There cannot be the least doubt but that the electors who voted this ticket intended to vote for the relators for trustees of common schools. The question therefore is, whether the substitution of the word "public" for

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the word "common," in the designation of the office of school trustee, vitiated the ballot, and deprived the elector of his vote. It is submitted that the ground on which these votes were rejected is untenable. The policy of the law is to favor the clearly expressed will of the elector, and not to discard his vote for a mere technical departure from the statutory rules relating to the form of his ballot. The word public, as applied to schools, is synonymous with the word common—common schools are public schools—and in this connection the term "public schools" is found frequently in statutes relating to common schools: "Public school moneys," (2 *R. S.* 5th ed. 92.) "Public instruction," (*Id.* 149 *et seq.*) "Public school society of the city of New York," (*Id.* 157, 158, 159.) "Public schools," (*Id.* 180, sec. 354.) The additional objection, that five of these ballots were not indorsed "school officers number ten," is frivolous. The object of this statute is to facilitate the distribution of ballots among the various boxes, and is purely directory in its nature. The ballots were put in the proper box by the inspectors. Besides, the city canvassers did not reject them on such ground.

II. By the statute which regulates elections, three inspectors are required to form a board of inspectors. (*Laws of 1860, page 405.*) The inspectors are to meet at the time and place when and where an election shall have been appointed to be held, and shall proceed to organize themselves as a board, for the purpose of presiding at and conducting such election; one of the inspectors is to be appointed chairman of the board, who is to administer to the other inspectors the oath of office, and afterwards to take his oath, to be administered by one of the other inspectors. (1 *R. S.* 5th ed. page 436, §§ 1, 2.) Whenever any inspector of election shall be a candidate for any office whatever, except for inspector or canvasser of election, at any election, his office as inspector shall immediately become vacant, unless he shall have publicly refused, within three days before the day of election, to be a candidate. (*Laws of 1857, ch. 294, § 3.*) The defendant Daniel Gallagher

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having become a candidate for the office of school trustee, he ceased to be inspector by virtue of the statute. Hence it is submitted, that in the 2d district the election was a nullity, because no board of inspectors was ever formed to conduct the election thereat. This objection goes to the jurisdiction of the persons claiming to be inspectors, who assumed to act in this district, and does not fall within that class of objections which relate simply to the regularity of the proceedings of the board of inspectors. (*People v. Cook*, 14 Barb. 259. *S. C.*, 4 Seld. 67.) If then, by reason of this difficulty, there was no board of inspectors organized to conduct the election in the second district, then the entire vote of that district should be disregarded, and this would elect both relators.

III. The objection taken that the relators did not take the oath of office prescribed by law, within fifteen days after the commencement of the term for which they were elected, is not tenable. There is no proof in the case that the relators did not take such oaths. Besides, the statute which requires it is merely directory. (2 *R. S.* 5th ed. 141.) "In general, where a statute requires an official act to be done by a given day for a public purpose, it shall be construed as merely directory in regard to time." (*Ex parte Heath & Roome*, 3 Hill, 42. *The People v. Cook*, 14 Barb. 259. *Howland v. Luce*, 16 John. 135.) Conceding that this objection was properly before the court at the trial, and can be urged upon appeal, then it is submitted that the statute in question only applies to the candidate who has received a certificate of his election. The oath is to be taken and subscribed "before the clerk of the board of education." This construction of the statute is borne out by section 25 of the article entitled "Of the oaths of office and official bond." (1 *R. S.* 5th ed. 411.) But this point is clearly settled by sec. 437 of the code, which allows the relator to take the official oath after judgment in his favor. (*People v. Ryder*, 16 Barb. 370, 375.)

A. R. Lawrence, jun., for the defendants.

By the Court, LEONARD, J. 1. The defendant Gallagher being a candidate for the office of trustee of common schools, in the 19th ward of the city of New York, at the December city election, 1860, his office as an inspector of elections for the second district in that ward became vacant. Such is the direction of the act of 1857. (*Sess. Laws, ch. 294, vol. 1.*) There is nothing in the act of 1860 (*Sess. Laws, ch. 246,*) inconsistent with that provision in the act of 1857, and it is still in force. Two inspectors of election may act, however. (*1. R. S. 422, § 13, 5th ed.*)

It was irregular for Gallagher to act as an inspector at that election. There were, nevertheless, two lawful inspectors, and by the statutory provision referred to, they were competent to act without Mr. Gallagher.

It might be considered that public policy requires the votes cast for Mr. Gallagher at the election district where he acted as an inspector should not be counted in his favor, but it is not necessary to decide that question, as will be subsequently seen. So far as the question affects the defendant McManus, the public policy which prohibits voters from being disfranchised, must prevail, in the absence of fraud or the violation of express statutes affecting the result, or rendering the votes or the election nugatory. True, Gallagher was not an inspector, either *de facto* or *de jure*. His office was vacant during the whole day of the election. That fact did not render the proceedings of the other two inspectors, or the ballots of the voters, invalid. It was held in *The People v. Cook*, (4 *Seld.* 69,) that the election was valid although four inspectors acted, part of the time, one of whom was, necessarily, wholly unauthorized to act.

There was no fraud alleged or proved in respect to proceedings at the said election district; nothing to show that the result of the election was in any respect affected by the conduct of the inspectors.

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In my opinion the returns from the second district were properly received ; certainly so far as McManus is concerned.

2. If the votes in the third and fourth election districts of the said ward, which were headed or designated for “trustees of *public* schools,” instead of *common* schools, as the office is called in the statute, had been allowed for the relators, one of them, Schaefer, would not have a majority over the defendant McManus. There were two candidates, only, to be elected. Those two candidates having the largest number of legal votes were the persons elected

The verdict is in favor of both the relators, and against both the defendants. It cannot be upheld, even if the views of the counsel for the relators are correct, in respect to the votes in the third and fourth districts, above referred to. The addition of these votes to those allowed would elect the relator Crimmins, but not Schaefer. The defendant McManus is entitled to his office, and the verdict, as against him, is erroneous, without reference to the technical question whether one action can be maintained in behalf of two claimants, each demanding separate and distinct offices. This may be, however, a question of pleading, and thus, if irregular, can perhaps be amended. It was erroneous to direct a verdict for both plaintiffs against both defendants.

Assuming that a trial may be had hereafter, involving the questions arising on the votes of the third and fourth election districts, it is important that the views of the general term thereon should be had.

We consider that the intention of the voters was distinctly manifested by the ballots which were cast for trustees of public schools. There were no trustees to be voted for at that election, except trustees of common schools. The voter cast his ballot for trustees of public schools. There was no officer, having exactly that name, then to be voted for, but there were trustees of schools distinctly indicated on the ballot, and no other officer called a trustee was then to be elected.

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We think, as matter of law, the relators were entitled to those votes; and that the intention of the voter was not here a question of fact for the jury, but of law for the court. (*The People v. Cook*, 4 *Seld.* 73-75, &c.)

The statute requiring the ballots to be indorsed in a particular manner is directory only, and not imperative. There is no nullifying clause in case the direction of the statute in this respect be omitted. (*The People v. Cook*, 14 *Barb.* 290-293.)

There being no evidence to show that the relators were ever notified of their election to office, the judge at the trial correctly held that the objection that they had not taken the oath of office was not tenable.

There must be a new trial, with costs to abide the event.

[NEW YORK GENERAL TERM, September 16, 1861. *Clerke, Leonard and Barnard*, Justices.]

 RUPP vs. BLANCHARD.

Although there may be an assignment of a chose in action by parol, yet, to constitute such an assignment, it must be shown that the owner surrendered all control over it, and had made an absolute appropriation of it.

Where a debtor agrees to assign to his creditor a claim which he has against another, in order to make it a valid assignment, the creditor must relinquish his claim against the debtor; otherwise the agreement will be without consideration, and cannot be construed into even an equitable assignment of the claim.

APPEAL from a judgment entered at a special term, on the report of a referee. The action was brought by the plaintiff as assignee of a claim of Lawson & Carll, against the defendant. The referee found the following facts: That on the fifth day of February, the plaintiff, Michael Rupp, held a judgment against Lawson & Carll for about the sum of two hundred and sixty dollars, which he was endeavoring

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to collect. That on that day, Lawson & Carll alleged that the defendant was indebted to them in an amount exceeding the amount of said judgment, and they thereupon made a verbal agreement with one of the attorneys of the plaintiff that they, the said Lawson & Carll, would turn over and assign to said plaintiff the amount of the indebtedness due Lawson & Carll from the said defendant, to be applied, when collected by the plaintiff, towards payment of said judgment held by the plaintiff against Lawson & Carll. That at the same time that such verbal agreement was made, Lawson & Carll handed to, and the same was received by, said attorney of the plaintiff, an account or bill of items of the indebtedness alleged by Lawson & Carll to be due them from the defendant. That this bill of items bore date the twenty-ninth day of January, 1858, and was made out against the "ship *Grand Duchess* and owners," and was nowhere signed or subscribed by Lawson & Carll or the defendant. That at the time of the foregoing agreement being made, the defendant was not present. That the plaintiff, at the time of such agreement being made, parted with no value on account thereof, nor relinquished any right upon the judgment he held against Lawson & Carll. That subsequently to such agreement for the transfer or assignment of said indebtedness, and on or about the ninth day of February, 1858, the plaintiff caused the aforesaid bill of items of the alleged indebtedness from the defendant to Lawson & Carll to be presented to the defendant, and a demand of payment to be made thereof. That the defendant promised to pay the said indebtedness after making certain deductions therefrom. That the defendant received no consideration for said promise to pay. That at the time of making such promise, the defendant was told that the bill of items then presented was the property of the plaintiff. That no note or memorandum in writing of such agreement to turn over or assign the debt of the defendant to Lawson & Carll, was at any time made between said Lawson & Carll and the plaintiff. The referee

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found, as a conclusion of law, that the plaintiff was not the lawful owner and holder of said indebtedness, and that nothing is due to him from the defendant, and that the defendant was entitled to judgment against the plaintiff that the complaint be dismissed. Judgment of dismissal was accordingly entered, and the plaintiff appealed.

B. F. Mudgett, for the appellant.

Beebe, Dean & Donohue, for the defendant.

By the Court, CLERKE, P. J. Although there may be an assignment of a *chose in action* by parol, yet to constitute such an assignment, it must be shown that the owner surrendered all control over it, and had made an absolute appropriation of it. And where a debtor agrees to assign to his creditor a claim which he has against another, in order to make it a valid assignment, the creditor must relinquish his claim against the owner of the *chose in action*. Otherwise the agreement is without consideration, and cannot be construed even into an equitable assignment of the claim. In this case the referee expressly finds, as a matter of fact, that "at the time of such agreement being made, the plaintiff parted with no value on account thereof, nor relinquished any right upon the judgment he held against Lawson & Carll." We see no reason whatever to disturb this finding. The referee was, therefore, right in finding from this fact, as a matter of law, that the plaintiff was not the owner of the indebtedness against the defendant. It is unnecessary to consider the other questions.

Judgment should be affirmed with costs.

[NEW YORK GENERAL TERM, September 16, 1861. *Clerke, Leonard and Barnard*, Justices.]

THE BANK OF LOUISVILLE *vs.* ELLERY & GIBBONS.

In an action by a banking corporation, as indorsee of a bill of exchange, the defendant cannot insist, at the trial, that it is incumbent on the plaintiff to prove its authority to purchase drafts of that character.

The defendant should move for a dismissal of the complaint on that ground.

Drawees who accept a bill of exchange or draft, after it is received by the holders, for a full and valuable consideration, are liable as acceptors; and cannot avoid their liability on the ground that the bill or draft was not actually accepted by them, at the time it was transferred to the holders.

It will be intended, in such a case, that the drawees authorized the drawer to draw the bill on them, before the holders discounted it, and that the holders advanced their money on the faith of such authority. *Per* LEONARD, J.

The action of the drawer, in making the draft, will be held ratified by the drawees, by their act of acceptance.

APPEAL from a judgment of the special term, entered upon the report of a referee. The action was brought by the plaintiff as indorsee, against the defendants as acceptor, of a bill of exchange. The complaint alleged that the plaintiff was a banking corporation, duly incorporated and existing under and by virtue of the laws of the state of Kentucky, and having full power and authority to do and transact the acts and matter hereinafter set forth. That the defendants were partners in trade, doing business in the city of New York, under the firm name of Ellery & Gibbons. That on or about the 22d day of September, 1859, the Exchange Bank of W. E. Culver, at Louisville, Kentucky, drew a certain draft or bill of exchange in writing, of that date, upon the said firm of Ellery & Gibbons, in the city of New York, whereby, fifty-five days after date, they required the said drawees to pay to the order of James Guthrie five thousand dollars. That the said payee thereupon indorsed the said draft, which was thereafter, and before maturity, for a good and valuable consideration, transferred and delivered to the plaintiff, by whom it is still held and owned. That the said draft was duly presented to the defendants, and was by them accepted in writing, payable at their office in the city of New York. That on the 19th day of November, 1857, the said

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draft became payable, and was duly presented at the office of the defendants in the city of New York, and payment thereof demanded, which was refused; whereupon the draft was duly protested by a notary public. That the said draft still remains wholly due and owing from the defendants to the plaintiff, together with the interest thereon from the 19th day of November, 1857, and seventy-five cents protest fee. For which sum of five thousand dollars (\$5000) and interest from November 19th, 1859, and seventy-five cents protest fee, besides costs, the plaintiff demanded judgment.

The answer of the defendants contained a general denial of the matter stated in the complaint; and for a further and separate defense, the defendants alleged that the draft or bill of exchange mentioned in the complaint was accepted by them, without funds in the hands of the drawer thereof to meet the same, and as an accommodation acceptance to the drawer; that the drawer never, since said acceptance, nor has any party, put the defendants in funds to pay such acceptance; nor have the defendants in any way received the consideration for the same. That the said acceptance was drawn at the city of Louisville, Ky., by Wm. E. Culver, and was there indorsed by James Guthrie, and by them, or one of them, negotiated to the plaintiff, on the credit of said drawer and indorser solely, and before the same had been sent to New York, or accepted by the defendants. And that the plaintiff did not become owner or holder of said bill of exchange for any consideration or value after the same was accepted by the defendants; and that as to the defendants the plaintiff was not holder of said bill for value; and as against the defendants, the plaintiff was not entitled to recover upon said bill of exchange; also, that the plaintiff received said bill on account of a precedent debt of the drawer or indorser, or paid or accounted for to one of them the proceeds of said bill, if discounted; such receipt of the bill and such discount, if it was discounted, being before the same was

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accepted by the defendants. Wherefore the defendants demanded that the complaint be dismissed, with costs.

The referee found, as a fact, that the bill of exchange mentioned in the complaint was duly signed and indorsed as in the complaint stated; and was transferred, in due course of business, to the plaintiff in this action, who received the same in good faith and on payment by it of a full and valuable consideration, and that the same was shortly thereafter, to wit, September 29th, 1857, and before it became due, accepted by the defendants; that the amount of principal and interest due on the said bill of exchange, at the date of the report, was five thousand five hundred and eighteen dollars and ninety-four cents, (\$5518.94.) The conclusion of law of the referee on these facts was that the defendants, as acceptors of said bill of exchange on which no payment had been made, were bound to pay the said sum of principal and interest so found due; for which amount, with costs, judgment was ordered. The defendants excepted to said report, as to the findings of fact by the referee. They also excepted to said report, because the referee had not found the following facts: 1. That as to the defendants the bill was not transferred in due course of business to the plaintiff, because said defendant did not accept the bill until after the transfer to the plaintiff. 2. That as to the defendants' liability on said bill the plaintiff was not holder for value, inasmuch as the same had not been accepted when the plaintiff received it. 3. That there was no proof of the authority of the plaintiff to purchase or discount the draft in question. The defendants also excepted to the conclusions of law of the referee, and whereby he decided that the defendants were bound to pay the amount of said bill to the plaintiff. They further excepted to said report as follows:

1st. Because the referee did not find that said bill of exchange, so far as the defendants are concerned, was and is an accommodation acceptance, for which the defendants had received no consideration, and that the plaintiff parted with

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no consideration on the credit of the names or acceptance of the defendants. 2d. Because the said referee did not find that the defendants were not liable to the plaintiff on said bill, for want of a sufficient consideration to charge them. 3d. Because the referee did not find that the acceptance of the defendants on said bill was a special undertaking to pay the debt of another without consideration, either expressed or received. 4th. Because said referee did not by said report decide as conclusion of law that the defendants were entitled to judgment in their favor, that the plaintiffs' complaint be dismissed with costs.

The defendants appealed to the general term.

E. L. Fancker, for the appellants. I. The answer denies the averment of the complaint as to the authority of the plaintiff; it was therefore incumbent on the plaintiff to prove its authority to *purchase* drafts of this character. (1.) Banks are *private* corporations, whose powers are limited by their charters, and such a corporation must find its authority in the law of its creation. (*Angell & Ames on Corp.* § 111. *The People v. Manhattan Company*, 9 *Wend.* 383. *Beatty v. Lessee of Knowles*, 4 *Peters' Rep.* 152. *Jansen v. Osterlander*, 1 *Cowen*, 686. *Utica Insurance Company v. Scott*, 19 *John.* 1.) (2.) It may well be that the plaintiff was not authorized to purchase a *foreign* bill of exchange, and that is the character of the draft in question. (*Edw. on Bills*, 49. *Buckner v. Finley*, 2 *Pet. U. S. Rep.* 586. *Wells v. Whitehead*, 15 *Wend.* 527. *Halliday v. McDougall*, 20 *id.* 81.)

II. The liability of the drawer and indorser became fixed, when the bill was sold by them to the plaintiff, and there was a consideration as to them. But the subsequent acceptance by the defendants, if treated as an original promise, was void for want of consideration. A past or executed consideration is not a sufficient foundation for a valid promise or contract. (*Union Bank v. Coster's Ex'rs*, 3 *Comst.* 211.

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Livingston v. Rogers, 1 *Caines*, 584. *Comstock v. Smith*, 7 *John.* 87. *Hicks v. Burhans*, 10 *id.* 243.) And parties to a note, equally with parties to other contracts, are affected by want of consideration. (2 *Kent's Com.* 464, 584. *Heath v. Sansom*, 2 *Barn. & Adol.* 729.) The plaintiff is not a holder for value, as to the defendants; the purchase of the bill having occurred before the acceptance. (*Farm. and Mech. Bank v. The Empire Stone Dressing Company*, 10 *Abbott*, 58.)

III. It may be shown, by parol, that the contract is collateral. (*Johnson v. Gilbert*, 4 *Hill*, 178. *Brown v. Curtis*, 2 *Comst.* 233.) The defendants, by accepting *after* the sale of the bill by the maker and indorser, made, simply, a special or collateral promise to pay their debt; and, no consideration being expressed, it was void, under the statute of frauds. (3 *R. S.* 221, 5th ed. sub. 2.)

Foster & Thomson, for the plaintiff.

CLERKE, P. J. The first point taken on the appeal, by the counsel of the defendants, was not presented in due time, at the trial. He should have moved for a dismissal of the complaint on this ground, and thus have given the plaintiff an opportunity to supply the defect. Besides, it is not denied that the plaintiffs are a banking corporation; and the referee finds that the draft was transferred to them in due course of business, and was received by them in good faith, and in payment of a full and valuable consideration. The referee also finds that the same was shortly afterwards, and before it became due, accepted by the defendants. So that the only question remaining, is whether persons who accept a bill of exchange or draft after it is received by the holders, for a full and valuable consideration, are not liable, on the ground that it was not actually accepted by them at the time it was transferred to the holders. But although it was not

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actually accepted by them at the time of the transfer, it was addressed to them. This address formed an essential and constituent part of the bill; the plaintiffs in receiving it had every reason to presume that the defendants had authorized the drawer to draw upon them; and their subsequent acceptance fully justified this presumption. The consideration of the acceptance, then, should not be deemed a past or executed one; but the acceptance should be deemed to relate back to the transfer of the draft to the plaintiffs, who may fairly be considered as receiving it on the faith of the defendants' credit, as well as upon that of the other parties to the instrument.

Many bills of exchange and drafts are discounted before they are transmitted for acceptance by the parties to whom they are addressed; and it would be opposed alike to the interests of commerce and the dictates of justice to hold that they are not liable after the action of the drawer in making the draft is ratified by the act of acceptance.

The judgment should be affirmed with costs.

LEONARD, J. It must be intended that the defendants authorized W. E. Culver to draw this bill of exchange on them, before the plaintiffs discounted it, and that the plaintiffs advanced their money on the faith of such authority. The acceptance of the bill by the defendants authorizes the intendment. (*Commercial Bank of Lake Erie v. Norton*, 1 *Hill*, 508, 509.)

The judgment should be affirmed.

BARNARD, J. concurred.

Judgment affirmed.

[N. Y. GENERAL TERM, September 16, 1861. *Clerks, Leonard and Barnard, Justices.*]

APPENDIX.

HON. WILLIAM KENT,

Sometime Circuit Judge of the first circuit, died at his country residence in Fishkill, Dutchess county, on the 4th January, 1861.

When the melancholy intelligence of his death reached the city of New York, on the following day, it was announced in feeling terms in the various courts which were then in session, all of which adjourned, in token of their respect for his memory, and of their sense of the great loss sustained by the public.

A meeting of the Bar, called to express the feelings of the profession on the death of their distinguished brother, was held in the general term room of the supreme court, on the 12th day of January, 1861.

The meeting was called to order by E. L. FANCHER, Esq., on whose motion (pursuant to request of the committee of arrangements appointed at a previous informal meeting of the Bar) the following gentlemen were unanimously appointed as officers:

President—HON. DANIEL P. INGRAHAM, of the Supreme Court.

Vice Presidents—HON. SAMUEL R. BETTS, of the U. S. District Court. HON. MURRAY HOFFMAN, of the Superior Court. HON. GREENE C. BRONSON, ex-Judge of the Supreme Court. HON. LEWIS B. WOODRUFF, of the Superior Court. HON. CHARLES P. DALY, of the Court of Common Pleas. HON. JOHN R. BRADY, of the Court of Common Pleas. DANIEL LORD, Esq.

Secretaries—WILLIAM FULLERTON, Esq. ALEXANDER HAMILTON, Jun., Esq. J. C. CARTER, Esq. D. B. EATON, Esq.

Judge INGRAHAM, the chairman, said:

We are convened, on this occasion, for the purpose of paying a tribute to the memory of one long known and honored in the midst of us, the late Judge Kent; and probably there was no one at the Bar of New York whose loss will be more deeply felt, and whose death more sincerely lamented, than his. A long acquaintance with him, commencing more than a quarter of a century ago, and continued with unabated kindness on his part, down to the period of his death, taught me to love and respect him, and I doubt not, the feelings which I entertain will find a response in the heart of every one who had the privilege of his friendship. Immediately after his admission to the Bar, Judge Kent entered into the practice of the profession in this city, and early obtained a rank which older practitioners had failed to reach. In the year 1841 he was appointed a judge of the first circuit court, then a branch of the supreme court, and so discharged the duties of that station, that his resignation, in 1845, was received with universal regret. Slight attacks of that disease which has since prostrated him, induced by an ardent desire, on his part, to break down a long calendar left to him by his predecessor, caused his retirement from the bench. I well remember, when remonstrated with, in reference to the excess of labor which he was, at that time, performing, that he expressed the utmost confidence in his strong constitution and uniform good health; but a few months taught him, as it has others of us who have succeeded him, the error which he was committing, and his resignation soon followed. To those who knew Judge Kent, it would be needless for me to speak of his uniform courtesy and kindness, of his great simplicity of character, of his high literary attainments, of his legal learning, of his judicial ability, and of his undoubted integrity. In all these respects he was pre-eminent. As a judge, as

a lawyer, he displayed eminent ability, and I think I may say, without hesitation, there never was on the bench of the supreme court, in this state, a judge more courteous to the Bar, and more kind to the young practitioner, or more acceptable to the profession, than Judge Kent. But I forbear to speak in detail of his character and virtues. It is sufficient for me to say, that in private life, Judge Kent was a christian gentleman, without reproach. As a lawyer, he was an ornament to the profession. As a judge, he was able, learned and upright. No man could see him but to respect him. None could know him but to love him. In all the relations of life he was honored; in death he will be mourned. We do well, then, to pay honor to his memory, and to record our esteem of his character and of his works, that others may be induced to imitate his example, and to emulate his virtues.

Hon. JOHN VAN BUREN said:

Mr. President: The Bar of the city of New York have received, with emotions of unaffected grief, the sad and startling intelligence of the death, in the meridian of his life and usefulness, of one of their most interesting, accomplished and distinguished members; and an informal committee of their number have asked me to propose to this meeting, called by them, resolutions expressive of our feelings upon this occasion. Summoned to this melancholy duty, I have supposed I should best consult the proprieties of my position by presenting for their consideration an expression, in the most simple and unadorned phrase, of the sense we entertain of the character of our lamented brother, and of the loss we have experienced. Intimately associated with him in the latter years of his life, admiring his brilliant intellect, thorough and general learning, rare acquirements and high personal qualities, it is to the native diffidence of his character that I offer tribute in the simplicity of the resolutions I propose; and upon my assurance of what his own modest nature would have preferred, that I venture, when I confine the proposed general expression by us within such limited terms. Those present, who will speak in detail of the life and character of William Kent, will be unable to restrain themselves within such narrow bounds. Dwelling upon the incidents of his judicial and professional career, and lingering over the recollections of his charming personal life, enthusiasm becomes natural and eulogy just. And if the veil should be drawn aside which conceals from public observation his domestic life, and we should stop to contemplate the happy relations of dependence and love which this death

has severed, it would almost cause a murmur at the decree of Providence that occasions an affliction so sad for a purpose so inscrutable.

Mine be the more humble office of presenting, for your unreserved disposition, resolutions touching the more general and striking features in the character of William Kent, appropriate, as it seems to me, for adoption by this meeting, dictated in sincerity and truth by those who respected and loved him while living, and will ever honor his memory.

Resolved, That the members of the Bar of the city of New York are profoundly sensible of the loss sustained by them in the death of their late associate, William Kent.

That, in contemplating the character of our deceased brother, we naturally and fondly revert to those qualities of his mind and heart which graced his personal demeanor and intercourse; to his ever-cheerful temper, his warm affections and genial sympathies, his fresh and playful spirit, and to the rare, varied and extensive literary and classical acquirements which he possessed in such richness, and held in such ever-ready command.

That, while thus mindful of the personal attractions now lost to us forever, we should not omit to testify our high appreciation of the professional learning, the clear and persuasive method of reasoning, the nice power of discrimination, unvarying industry, strict sense of justice, inflexible integrity and great practical wisdom, which illustrated and adorned his career as a leading member of the Bar, and as a distinguished judge of this circuit, reflecting additional honor upon the great name he inherited, and placing his memory justly by the side of that of his illustrious father.

That we tender the expression of our sincere condolence to the afflicted family of the deceased, and that a copy of these resolutions, signed by the officers of this meeting, be transmitted to them, and be also published in the newspapers of this city.

BENJAMIN D. SILLIMAN, Esq., spoke as follows:

Mr. President: I move the adoption of the resolutions which have been presented by Mr. Van Buren. They express, I am sure, the feelings and the judgment of this numerous meeting of the Bar, which is not convened in mere accordance with the usage of rendering the tribute due to the honored dead, but the spontaneous impulse of our hearts has brought us together to give utterance to our grief at the loss of one whom we have long loved as well as honored.

It might, perhaps, be difficult to say whether Judge Kent was more remarkable for his intellectual and professional, or for his moral superiority; but that which, in this hour of bereavement, touches us most nearly, is the surrender which we must make to the remorseless grave of one whose generous and gentle nature, whose genial sympathy,

whose warm affections, had so endeared him to us, that our admiration of the lawyer, the jurist and the scholar, was even exceeded by our attachment, by our love for the man. He is cut off from us in the very glory of his manhood, with his faculties and his affections in the fullness of their strength and action—ere age had dimmed their brilliancy, or impaired their power, or chilled their ardor.

Judge Kent was born in Albany, in 1802.(a) He had the best advantages of education. After being graduated at Union College, he pursued the studies and entered the profession in which his father, the great Chancellor, stood pre-eminent. He commenced his career as a lawyer, in one respect, under a disadvantage—that of the shadow of a great name. The world is apt to measure the son of a great man by an unfair standard. Instead of passing on his merits and talents by comparison with those of other young men—his cotemporaries and peers—it withholds its commendation unless he displays ability which would add to his father's fame. But Mr. Kent quickly showed himself equal even to such a test. He was early engaged in very important causes, in which he manifested powers and learning that placed him at once in the foremost rank of the profession; and well did he sustain his place there, adding new luster to the illustrious name he bore.

His natural gifts were of the highest order, and his attainments were such as would have rendered a man of merely common mind distinguished. He possessed remarkable power of analysis, and saw, with the quickness of intuition, the right and morality of a case, and the principles of law involved, and he was ever ready with the learning of the law requisite for their illustration. The force of his argument was aided by the singular felicity and purity of the language in which it was always clothed. So beautiful and attractive was his style, so happy his illustrations, so abounding in wit, and grace, and learning, and thought, that, whether he was arguing a case or trying a cause, not only the court or jury which he was addressing, but all who were present, having no concern with the subject, including alike the members of the bar and mere spectators, were always eager and delighted listeners.

The time and occasion hardly warrant me in adverting in detail to the leading cases in the arguments of which Judge Kent was distinguished. There are present many who were engaged with him, either as associates or opponents, in those cases, and none can be more earn-

(a) October 2.

est than they in commendation of the power and learning manifested by him in their discussion.

He continued in the active practice of the profession until 1841, when he was appointed to the office of circuit judge, on the retirement of the Hon. Ogden Edwards, and "when the ermine rested on his shoulders, it touched nothing less spotless than itself." Never were the high duties of a judge performed with more of purity or fidelity. Never were the scales held by a more even hand. Never were the kindly and charitable impulses of a gentle nature more entirely restrained and subordinated to the duty of an inflexible and impartial administration of the law, whether in criminal or in civil cases. In 1844, his health having been impaired by too close application to his judicial duties, he resigned his station on the bench, to the great—it is not extravagant to say the universal—regret of the profession and of the community.

He then visited Europe, and while there, in 1846, received the invitation, which he accepted, from Harvard University, to succeed Judge Story in the law school at Cambridge. The same industry, and success, and usefulness, which had marked his previous career, attended his services in the law school, until the close of 1847, when he resigned his professorship, that he might be with his venerable father, whose twilight was then fast fading into night.

Judge Kent then resumed the practice of the law, and from that time forward continued it in this city with eminent success. Among the remarkable cases in which he bore a distinguished part, was that of *Clarke v. Fisher*, (reported in *1st Paige's Rep.*,) in which were considered the nature and degree, and condition of mental power of the testator, requisite to make a valid will. His argument was one of singular ability and learning. It was one of the earliest cases in which he was engaged, and one in which, in the judgment of the bench and the bar, he achieved just, as well as great, distinction.

I may also mention the case of the *State of Illinois v. Delafield*, (8 *Paige*,) as to the power of state officers to bind the state in borrowing money for its use, and the limitations of such power; the cases of *Warner v. Beers*, and *Bolander v. Stevens*, (23 *Wendell*,) involving the momentous and vital question of the constitutionality of the general banking law; the great case, so universally known in the profession, and out of it, of *Curtiss v. Leavitt*, (17 *Barbour* and 1 *Smith*,) in which many most important principles were discussed, and an immense amount of property was at stake; and that of *Beekman v. The People*, (27 *Barbour*,) involving the law and recondite learning of charitable

uses. In these cases (not to speak of very many others) Mr. Kent exhibited ability of the highest order and the rarest learning, and earned a reputation which (in the language of one of the resolutions before us) placed his memory justly by the side of his illustrious father. The great men of the Bar were engaged in the learned discussions of those cases. I may not name those of them who are still among us, and most of whom are now present, but of those who are gone were Jones and Jay, and Ogden and Webster, and Griffin and Sandford, and Spencer and Beardsley, and Hill and Butler. Such were the allies and the adversaries of our departed brother—such were his friends and compeers—such were the great intellects with which his own found congenial intercourse.

He had latterly withdrawn somewhat from his practice in the courts, but still continued in the active duties of the profession. His opinion and advice were sought in important cases. Difficult and intricate cases were constantly referred to him for decision, and weighty and responsible trusts, embracing vast interests and amounts of property, were eagerly confided to his charge and guidance by individuals and by the courts.

Judge Kent possessed, as did his father, a most remarkable memory. He forgot nothing. Every fact, every rule, every principle, when once attained, remained with him always. He combined what are, perhaps, rarely combined, large general knowledge with great accuracy of knowledge. As a *belles lettres* scholar he had few equals in this country. His reading was not limited by the ordinarily wise rule, "*non multa sed multum*," but it was both *multa et multum*. Whatever he studied he studied thoroughly. He read every thing, and he remembered every thing. What he read did not remain with him a mere accumulation of knowledge and ideas, but became part of his mental nature, storing and strengthening his mind without impairing its originality. A mind thus enriched, and with such resources, could never have suffered from solitude. It would find within itself abundant and choice companionship. Eminently was this the case with our departed friend and with his venerable father.

Chancellor Kent, during his last illness, passed many silent watches of the night without sleep. When asked if in those long, sleepless hours, he suffered from depression and sad feelings, he replied that he did not—but that, on the contrary, he then derived great satisfaction in reviewing in his mind sometimes some leading principle of the law—going back to its origin—to the reasons from which it sprang—and then recalling in their order the subsequent cases, in

England and in this country, in which it had been considered, shaped, enlarged, or qualified down to the final settled rule; at other times he would select some period of history—perhaps some English reign—and recall its politics, its law, its eminent men, its military acts, and its literature, in connection with the cotemporaneous history and condition of other countries; sometimes a campaign, perhaps of Alexander, or Cæsar, or Marlborough, or Napoleon, with its plan, its policy, its incidents and its results.

Judge Kent's general reading was but little inferior to his father's. I doubt whether the Chancellor, at the same period of life, had been able to devote so much of his time to other reading than of law, as his son had done.

One of the early symptoms of the disease which terminated Judge Kent's life, was the loss (some months ago) of vision of one of his eyes. He had reason to fear that he should become entirely blind, but when he spoke of it he added, that it would not make him sad or unhappy, for he remembered all the books he had read, and when he could no longer see he should mentally re-peruse them all.

It is a grateful reflection that, until his last illness, his life had been one of almost unclouded happiness, save in the loss of his parents. Honors sought him, prosperity attended him, friends loved him, and now deeply lament his loss. I have never known a man whose happy temper, and warm heart, and kind and genial sympathies, so won and attached to him all, of all classes, who came in contact with him, or so conduced to the happiness of all about him. I have never known a man whose wit, and humor, and knowledge, and wisdom, were so abounding and so blended, and the instructiveness, and beauty, and grace, and simplicity of whose conversation, so attracted and fascinated. I have never known a man more fearless in asserting the right, and in the performance of what he deemed his duty. I have never known a man more inflexible in principle, or more strictly upright. Though to a stranger what I have said might appear the strained language of eulogy, yet this meeting is full of witnesses of its truth.

Mr. President, death has of late swayed his scythe fearfully through the ranks of our profession. How many familiar faces have disappeared—how many voices of the learned, the wise, the brilliant, the good, to which we have listened within these walls, are stilled forever. Of your honored companions who dispensed justice from the Bench, Jones, and Morris, and Edwards, and Sandford, and Paine, and Oakley, and Duer, and Mason, have gone in close procession; and, among

others from the Bar whose learning, and talents, and virtues, adorned our calling, the grave now hides forever from us the forms of Hoffman, and Ogden, and Griffin, and Sandford, and Spencer, and Hill, and Wood, and Butler, and Miller, and him to whose memory we are now assembled to pay this last tribute of affection and respect.

His death was one of peace, as his life had been one of uprightness. He had so lived and so believed, that when he came to walk through the dark valley he "feared no evil;" but, leaning on the rod and the staff which can alone support man in that dread hour, he was .

—— "sustained and soothed

By an unfaltering trust, and approached his grave

Like one who wraps the drapery of his couch

About him, and lies down to pleasant dreams."

I will not trust myself to speak of the personal relations and almost life-long intimacy that make his death to me indeed a calamity, nor of the hopeless sorrow of that home of which he was the light, the pride and the joy; but, with the same beautiful invocation which he so lately uttered on the death of Mr. Butler, let me say: "Tread lightly on his ashes, ye men of genius, for he was your kinsman! Weed clean his grave, ye men of goodness, for he was your brother."

Ex-Judge Foot said:

Mr. Chairman: The duty of seconding the adoption of the resolutions which have been presented to the meeting, has been assigned to me. That duty is freely discharged, as I fully concur in the sentiments expressed in the resolutions, and it is moreover grateful to my feelings to have so suitable an opportunity to manifest my regard for the memory of our deceased brother, with whom I have stood in intimate relations of business and friendship for a lifetime. After graduating with credit at Union College, he was placed by his distinguished father, Chancellor Kent, at Kinderhook, under the instruction of Peter Van Schaick, one of the most learned and accomplished lawyers of this state, and who had then been compelled to retire from active service by reason of his impaired sight. There he passed, I think, two years, studying and acquiring a knowledge of the principles of his profession. He then came to Albany, where his father resided, and, in the year 1822, entered my office to complete his clerkship, and more especially to acquire a knowledge of pleading and practice. He remained with me until the autumn of 1823, when his father removed to this city, and he came with him. While in my of-

fice, he was active, attentive and studious. He finished his clerkship in this city with the Hon. Josiah Ogden Hoffman, and on being admitted to the Bar, entered into copartnership with him. I removed from Albany to this city in May, 1828, and entered into copartnership with our deceased brother. We continued in copartnership for two years, and occupied offices in connection with his father. In June, 1828, the Franklin Bank failed, and Chancellor Walworth appointed Chancellor Kent receiver. The affairs of that bank were greatly extended and complicated, which gave our firm, of Foot & Kent, a large and lucrative business. My nephew, Henry E. Davies, the present Judge of the Court of Appeals, having removed from Buffalo to this city, a new business arrangement was made in the spring of 1830. Mr. Davies entered into copartnership with me, and Mr. Kent formed a connection with William S. Johnson. The partnership of Foot & Davies continued till the spring of 1847, when I removed to Geneva, and then our deceased brother took my place, and formed a copartnership with Mr. Davies. This connection continued for several years. On my way home from this city to Geneva, near the end of the month of September last, I stopped at Fishkill to pass a Sabbath with my relative, Judge Davies, and visit my friend Judge Kent. At the close of the Sabbath, Judge Davies and I called upon Judge Kent. We found him walking in his lawn. As soon as he saw me, he approached and met me. It was our first meeting since his illness. Enfeebled by sickness, he could not command his feelings, nor could I entirely command my own. After walking with him some time over his beautiful grounds, conversing sparingly, and on topics least calculated to excite our sensibilities, we entered his house. A pleasant conversation with him and his family ensued. Fearing to prolong my visit, though urged by him to do so, I took leave of him, apprehensive that it would be, as it was, our last meeting. Thus closed an intimate business and social intercourse, which lasted for thirty-seven years, without an incident or a remark to interrupt or mar its happiness. This enables me to speak of our deceased brother with knowledge, and to say, what simple truth requires me to say, that he was an honest man, a good lawyer, a learned and upright judge, a ripe scholar, and a finished gentleman. In one respect he excelled all men I have ever known, and that was, in the care and watchfulness with which he avoided injuring the feelings of others. No person, high or low, rich or poor, ever heard him make a rude, harsh, or unkind remark. It was a lovely trait of his character, and one which rendered him so acceptable, as he was, to all. I could re-

call and dwell for hours on pleasing incidents of his well-spent life, but they are more appropriate for the social circle, or retired contemplation, than public exhibition. My feelings lead me rather to think, than to speak of him; and I will close my remarks with the observation, that we may justly be proud of our country and institutions, when in the one, and under the fostering influence of the other, men like William Kent are raised, live, and die.

Judge THOMAS W. CLERKE said:

Mr. Chairman: At the request of the committee, I rise most cheerfully, and yet most sorrowfully, to concur in the resolutions.

For the period of thirty years, during which I have been engaged at the Bar, and on the Bench, in the administration of the law in this city, this is the first time I have felt justified to speak to a resolution upon an occasion of this kind. Not that all the individuals, whose death summoned assemblages of their brethren to testify their respect and grief, were unworthy of eulogy, but because I could not, with truth, say that I personally knew enough of their characters and manner of life, to enable me to offer any satisfactory comments concerning them. Besides, on some of those occasions, I imagined a disposition to bestow praise without discrimination, to give credit for qualities not possessed; or, at least, to exaggerate the merits of the deceased. But, on the present occasion, I may truly say, I speak that which I know; and, although I had not frequent opportunity of very familiar intercourse with Judge Kent, I have been rather intimately acquainted with him during the whole period of my professional and judicial career. His sagacity, his suavity, and his legal learning, attracted my early notice and regard; and I have not been inattentive to the incidents and course of his professional and public conduct. Therefore, the trifling and imperfect tribute which I am able to offer on this occasion, is not offered in obedience to frigid custom—is not the tribute of dry routine—is not the hollow adulation of the lips, but is the voluntary homage of the heart, founded on sufficient knowledge of the man, and fortified by the unhesitating voice of the community in which he lived.

To say that William Kent was a gentleman of integrity, of unblemished life, of elevated and honorable sentiments, of great discernment and intelligence, exhibiting affable manners, and possessing professional skill and knowledge, would only be saying what could, with equal truth, be said of many others. These qualities, indeed, he possessed and exhibited in an eminent degree. But I should be doing

injustice to my subject, if I did not mention the characteristics which, I think, distinguished him from ordinary men. To a profound knowledge of the principles and history of the law, he added the graces of superior literary culture, and a thorough and extensive acquaintance with the classic authors of our language. This infused into his mind a taste which manifested itself in all his compositions, legal or general. In these you discover no cumbrous redundancy, no attenuation of the thought, no straining for display, no useless parade of authorities, no abortive attempts at high rhetorical flights, which the subject did not require, or which the writer could not sustain. His style was lucid, complete and elegant. He disdained unnecessary words and meretricious ornament. In short, he was learned without pedantry, precise without ostentation, and copious without prolixity.

As we all know, he was the son of one of the most eminent jurists whom this country has produced, and although, in some respects, it is an advantage to inherit the name of a distinguished parent, yet it is not without its drawbacks and difficulties. Too much is generally expected from a person inheriting such a name, and every thing he does in his profession, even when he exhibits considerable attainment and capacity, is apt to be severely criticised, and unfavorably contrasted with the riper endowments of his father. This is often accompanied by a popular opinion, founded on something savoring of a superstitious notion, that great abilities are seldom transmissible to a man's descendants—a notion undoubtedly at variance with the teachings of experience and of mental science, but, nevertheless, like a host of other errors, very generally held. The subject of our remark, I suppose, encountered those difficulties, but he successfully surmounted them; and although he was not as extensively known as the Chancellor, all who did know him, capable of forming an opinion, believed that the ability and learning of the son were not inferior to those of the father. He was only a short time, comparatively, on the bench, and he never wrote a voluminous work, like the Commentaries on American Law; but I am sure, if he remained long enough on the bench, or if he chose to employ his talents in the production of a legal treatise, his reputation would not suffer in comparison with that of his father. Indeed, he could have attained fame and the highest position in any pursuit requiring the exercise of high intellectual qualities; but his ambition was chastened and moderate, and he seemed to have no aspirations for place or popular applause. He was one of those, of whom the poet says,

“Although he could command, he slighted fame.”

All who knew him, I am persuaded, feel this day, that the nation, the state, and the local community in which he lived, have sustained a serious bereavement. But our loss is, I trust, his gain. He has left us in the height of a fearful crisis in our country's history. In the words of the evangelical prophet, I may say: "The righteous perisheth, and no man layeth it to heart; and merciful men are taken away, none considering that the righteous are taken away *from the evil to come.*" Our departed brother is spared, probably, the necessity of witnessing, what to him would be worse than many deaths—the dread catastrophe which, we have too much reason to fear, is now impending over us—which I pray God, even now, in His infinite mercy, to avert. Judge Kent would rather have died, if it were left to his option, than to behold the great Republican Empire of the West shattered into miserable fragments—freedom's brightest hopes obscured, perhaps forever blighted—the utter and shameful failure of the most goodly and complete experiment of self-government ever designed. No, he loved his country too fervently, to desire that he should survive her downfall. To such a mind as his, there is something agonizing in the thought of the extinction of this nation; and, if such a direful calamity should be approaching, many a patriotic heart in this land would consider William Kent a happy man in dying before its consummation.

I conclude, sir, by cordially concurring in the resolutions proposed.

SAMUEL E. LYON, Esq., said:

Mr. President: The custom of meeting, as a body, to testify our respect for the memory of a departed brother, obtains only, so far as I have observed, among our own profession, and the havoc that death has made among us within a few years, has called us together with painful frequency. These meetings are characteristic of our profession; for any one who is familiar with our traditions, or has noticed the daily incidents of our lives, must have seen that we are more closely allied to each other, and more really interested in the success and advancement of each other, than is the case in most other callings in life; and when death comes among us, it seems to me that we really feel that we have had, in the kindly language of our guild, a brother taken from us. To-day, no term less near, would symbolize our feelings, for our departed friend was, in truth, beloved by all who came within the sphere of his attraction. To-day, we think only of his heart, and that great flood of warmth which he shed upon those whom he loved. To-day, we forget that luminous mind and exhaust-

less memory, and pay our tribute to the true man and cordial friend, the grasp of whose hand will meet ours no more. At a future time, some fitting pen will do justice to his intellect—for the present, we commune over his ashes, in view of the things which the head did not fashion, the recollection of which, almost makes children of us, and seeks to express itself in words and forms as simple as children would use, grieving over a lost companion.

No one realizes a great loss at the moment the blow falls. God, in his mercy, has made this to be so: but those of us who have known Mr. Kent for many years, and have been admitted into the inner temple of his friendship, and have passed that period of life, after which men make few new friends, will realize, with a consciousness deepening day by day into our hearts, that no inconsiderable part of our store of interest and affection has gone down with him into his grave forever. Yet the memory of his kindly smile and genial tones will stay with us as long as we have a memory to hold the precious gifts of life.

But, outside of this small circle, and still outside of that larger circle, who esteemed and admired him from the most casual acquaintance, Mr. Kent held a peculiar relation to all the lawyers, and, indeed, I might say with truth, to all the people of this state.

We held him as one of the heir-looms of the law, and cherished him as a birthright of the profession. There was not a law student in the most remote county in the state, with whom the name of Kent did not become associated with his first lesson in jurisprudence, and who knew that down in the city of New York there was one upon whom the name had descended, worthy to bear the great and spotless mantle that had fallen upon his shoulders. As the only son of him who may be said almost to have created that branch of our jurisprudence upon which especially he shed the light of his intellect, and bestowed the labor of the best part of his life, we considered the child of his loins, in one sense, a co-heritage with that monument of his judicial life, and while we gave to the one our admiration, we added for the other our esteem and love. Even at this moment, we rejoice to know that they will go down to the coming years together, and that, joined as they were in life, in death they are not severed.

I do not believe there is a name connected with the history of this state, whose work commenced after the adoption of our federal constitution, which is held in the same degree of affectionate regard, even among laymen, as that of Kent. Its inscription upon the roll, where we preserve our honored names, stands in more clearly defined char-

acters now, than on the day when his life passed into the domain of history. It is the best tribute that, in this hour of bereavement, we can render to the memory of our departed friend, that he never sullied that name, or darkened one ray of its conspicuous lustre; and we cling the more fondly to the memory of our brother, for that he did maintain the high standard of his inheritance, in spite of his eminently good fortune. With such a name to fall back upon, with ease, if not affluence, always at his command, and never feeling the spur of necessity, why should he enter the arena of that hard struggle, which begins with its summons upon a wearied brain, as the new year dawns, and does not end when the old year goes out? the soreness of which, you, my brethren, alone know, and which these faces around me, pallid with toil, and seared with tracks not made by years, too well attest.

That he did so, and made a record for himself that would have been honored and loved, if his father had left him obscure in name, and poor in purse, is one of his highest claims to our respect, and while we will pay a proper homage to his lineage, we will cherish his memory in our heart of hearts, for those best things which he himself bestowed upon us.

WM. FULLERTON, Esq., said:

Mr. President: In speaking to the resolutions offered, I shall not enter into any detail of the life or character of William Kent. That would be but a repetition of what has been so well said by those who have preceded me. In offering my feeble tribute to his memory, I shall ask your attention, therefore, but for a moment. •

This saddened audience recalls to our minds the many occasions on which we have been assembled, within the past few years, to honor the worthy dead.

How many shining lights of the Bench and the Bar have, within a brief period, been extinguished by the hand of death!

Judges Jones, Edwards, Oakley, Duer and Ingersoll, no longer adorn their wonted places; and the voices of Sandford, Wood, Butler and Hill, are no longer heard in the peaceful conflicts of our courts.

Thus, one after another, the good and the great are passing from among us,

“ To keep
That calm sleep
Whence none may awake.”

No man would be more missed by his circle of friends than Judge Kent. For, who of them has not been the recipient of his kindness? Who of them has not felt the magic of his presence, and been charmed by his genial wit and humor? Who of them has not profited by his counsel, and enriched himself from the treasures of his learning? And above all, who of them has not been strengthened by that unbending integrity, that strong sense of justice, which marked his whole life, whether he held the scales between contending parties, or moved in the less conspicuous sphere of private or professional duty?

He will be missed by judges: for he had an experience from which they could learn wisdom.

He will be missed by lawyers: for whose name was so readily agreed to, to determine the rights of litigating parties, in that important class of cases which are tried out of court, as his—not more for his great learning, than because his name was a guarantee that those rights would be judged, not only by a sound and discriminating mind, but by one whose integrity was above every earthly temptation.

He will be missed by his personal friends: for his winning manners, amiable temper, and kind and affectionate nature, made him a companion never to be forgotten.

There is another place where he will be missed, of which it is scarcely proper for me to speak. But who that has seen him surrounded by the sweet attractions of a home, where he was the beloved and honored head, can fail to contemplate the desolation which has fallen there?

Judge Kent's death, though sudden, was not unexpected. The character of his disease was such, that for many months past it has been certain that his active usefulness was at an end, and his days numbered.

I have a painfully vivid recollection of the day when his physician, for the first, communicated to him the fatal nature of his malady. Up to that time it had not been suspected. Surrounded as he was by every thing that could contribute to human happiness, and possessing an exquisite taste for the world's innocent enjoyments, the announcement was a blow as severe as it was unexpected. He yielded to his fate with a becoming submission, but from that time he sank,

——— “yet so calm and meek,
So tearless, yet so tender — kind,
So grieved for those he left behind,”

that the close of his life was a continued exhibition of those graces which were so prominent in his character.

In honoring such a man we honor ourselves.

I will not consume the time which belongs to others, but close my brief remarks by adverting to the moral beauty, as well as propriety, of these proceedings.

As a class, we have paused for an hour, arrested the business of our offices and courts, that the death of one of our number, eminent for his virtues and noble life, may make its suitable impression upon our hearts, to the end that we may, to some extent, imitate those virtues and follow his example.

Nothing would so much honor the memory of him whom we all deplore. For thus would our lives become his living monument, and the principles which guide us, his appropriate epitaph.

Happy will it be for us, and for those around us, if the contemplation of the character of William Kent shall enable us to shed around our path some of the many blessings which ever irradiated his.

Mr. MAXWELL said:

After what has been said so eloquently and so well, little remains to illustrate the character of our lamented friend and brother. The young and the aged meet together to do honor to the memory of Kent. I come to claim the privilege of lamenting, in common with my younger brethren, the death of our friend; and though our eyes be somewhat dim—though the words flow less readily from the tongue than they were wont to do—we are not less deeply affected than younger men who deplore the death of the good and the wise—one whom we loved and honored for his excellence of mind and heart; and we come, on this occasion, impressed with the sentiment of the great English moralist, “Far from us be that frigid philosophy that would conduct us, indifferent and unmoved, over any ground ennobled by wisdom, learning, or virtue.”

We have heard from eloquent gentlemen a just eulogium on the professional and moral character of Judge Kent. They have referred to the overshadowing influence of his father's name, and how the son persevered, with modest views of his own personal merits, relying upon them alone for professional success.

Undoubtedly there might have been a drawback, from the fact, that the public attributed to the illustrious Chancellor acquirements which were scarcely to be obtained by the exertion of the son. This may, in some degree, be true; but I think the young men at the Bar will

not fail to recognize and do honor to the moral beauty and courage in the character of Kent, as exemplified by the unaffected, simple demeanor of his life and manners. At an early age, he was thrown into frequent intercourse with many distinguished men, who frequented the house of his honored father. This brought with it, the danger of an exaggerated self-esteem—a false estimate of one's self, under such circumstances—too often the infirmity of common men. But, gentlemen, from this trial Kent came forth unscathed. He came forth without a taint of affectation, without a taint of arrogance or presumption. Was not such an ordeal more hazardous than that trial which attends so many young men of the profession—who are obliged to fight the battle of life, to attain a position only to be won by nights of study and days of toil, and often amidst the ills of adverse fortune?

My friend, Mr. Silliman, has spoken of the genial temper, and of the kind feelings in social life, by which Judge Kent was endeared to his friends. There are some here who have seen him in moments when he threw off the cares and anxieties of judicial and professional life: some of us—alas! how few—have met him in the brotherhood of the Bar, when “the feast of reason and the flow of soul” consecrated and ennobled the “*scenæ noctes quis deorum*.”

Allusion has been made to the literary character of our lamented friend. He was eminently distinguished as a scholar of highly cultivated taste. In the range of French and English literature, few professional men excelled him in the extent and variety of his reading. He was well versed in the classics of Greece and Rome. From such sources, we may conclude that he acquired, cherished and honored the glorious sentiment of Robert Burns:

“The rank is but the guinea's stamp,
The man's the gowd, for a' that.”

Mr. President, you have referred, in eloquent terms, to Kent as a lawyer and a judge; others have united in similar terms of eulogy. The gentleman and scholars of Cambridge have testified to the high estimate you have expressed, accustomed to judge others by the standard of their Websters, their Everetts, and their Storys. Kent was thought worthy of distinguished professional honors of Harvard. Then, what shall be said of him in his judicial character? You have said, Mr. President, that the ermine he wore was pure and untainted. You may say, too, with truth, that he came upon the bench with sentiments, without which, the character of a judge, under our present system, is hardly respectable. He came upon the bench with a just

appreciation of the dictanter of Lord Mansfield : "I wish popularity—popularity which follows, not that which is run after—popularity which, sooner or later, will not fail to accomplish noble ends by noble means." He felt the truth and force of the sentiments of the great Roman magistrate : "*Ego hoc animo semper fin ut invidiam virtute partam—gloriam non invidiam putorem.*"

Sir, he was honored and beloved for his intellectual excellence, and for the best impulses of a pure and noble nature. He has left an example which, I trust, will find many imitators among the young men of the profession. After a long sickness, the command of Heaven was heard : "Set thy house in order ; thou shalt die, and not live." We have reason to believe, Mr. President, that the voice of God fell not upon heedless ears. We have reason to believe and to rejoice, that Kent died in the full fruition of christian faith and hope.

JAMES T. BRADY, Esq., said :

You may be surprised, Mr. President, that I should rise to address this meeting of my brethren at so late an hour of the day, and after the touching display that has been already made in doing justice to the memory of the worthy man whose loss we now deplore, and whose virtues we commemorate. He has been spoken of in fitting terms of eulogy by his opponents, his associates, his intimate friends ; by the young with reverence, by the old with grief—and, of these latter, by one who comes among us almost from a past generation,* in the full fruition of the honors he so deservedly wears. We hear his welcome voice proclaiming, in words of truth, the great merit that belonged to the deceased, and the solemn duty we owe his memory.

This, sir, would be enough for any man in any period of the world's history. It would have been an adequate tribute, if offered in behalf of that great orator who flourished in the palmiest days of Rome, and to whom our friend, Mr. Maxwell, referred, when he quoted to our delighted ears a beautiful passage in that grand old tongue which, it would seem, no worldly change can eradicate, no lapse of time efface.

I am compelled to say, that I feel reluctant to disturb the harmony of these proceedings, by the unconsidered phrases which I must employ at this time. In endeavoring to express myself as I should wish, I feel not less hopeless than did poor Ruth, when she "stood amidst the alien corn." There is, in truth, no gleanings to be done here. All that I can attempt, is to take the thoughts and words that lie scat-

* Hon. Hugh Maxwell.

tered in my intellect, or rise unbidden to my tongue, and lay them as a heartfelt offering, and with all sincerity, on the grave of my departed friend. His exquisite taste, his matured judgment, would enable him, were he here, to estimate their truthfulness, and to say whether there was any beauty in the sentiments they expressed. He might exclaim :

" We perish as the flowers do,
And breathe away
Our lives upon the passing wind,
Even as they !"

When I was engaged, while yet a boy, in the study of the law, it was one of my pleasures to attend before the good and gifted Riker, in the criminal court, where he presided with so much dignity, and which he quitted amid the regrets of all who had experienced his amenity, or knew his love of truth and right. Our good friend, Mr. Maxwell, in speaking of those of our brethren who have gone before us, reminds me, that in those days when he was so deservedly eminent, there were, among the men who appeared in the same tribunal, the lamented Graham, the warm-hearted Blunt, the eloquent Hoffman, and many more whom it is needless to recall—all gone, but still remembered for their genius, their acquirements, and their virtues.

Fortunately or unfortunately, there was then a throb of hope in my breast, that the time would come, when even so great and solemn a responsibility as that of defending a man whose life was in jeopardy, should devolve upon me. The time at length arrived. It so happened that a poor Irishman was charged with the crime of murder. He was an humble person, with few friends and no money. Of his friends, the fondest, most devoted and persevering, was a true-souled little woman, born like her husband, and my own ancestors, in that beautiful country, on whose bosom so many generations of noble beings have laid themselves down in the last repose. She sought my aid in the hour of peril to him she loved, and I could not refuse it. None of my profession would. But it was with fear and trembling that I undertook the duty. If I had known the future terrors it was to bring upon my heart and brain, I would have faltered long ere I engaged in the cause. If ambition alone had impelled me to the undertaking, I would have dashed that impulse upon the ground and smiled upon the fragments of its ruins.

Without considering at large how the fortunate result in that case was accomplished, I may say that, in *purely legal* contemplation, the

act proved was in any of its aspects a clear case of murder. It had not that awful feature, however, in its *moral* bearings, and my aim was, of course, to present, with whatever slender experience I possessed, all the extenuating circumstances that could be urged in behalf of the unhappy prisoner. I remember, with painful distinctness, that on the eve of the trial, I walked homeward with the clerk of the court, and the then vigorous and effective district attorney, who informed me that the guilt of the accused was so flagrant, that it would be his solemn duty to make all legitimate efforts to secure his conviction. I leave my impressions, under the circumstances, to be estimated by those who have ever incurred an equal responsibility. Had I been obliged to undertake this defense where I should not have received that kindness that was so delicately and so thoughtfully extended to me in that court, I know not what the result would have been to me personally. If there be any thing in this life dreadful to contemplate, it is the annihilation of the fondest hopes we hug to our bosom—the destruction of the means by which we strive to attain even temporary distinction, and the laceration of the heart, by which great disappointments, affecting our destiny or prospects, are sure to be attended. The trial proceeded, and, in its progress, it would seem that the jury were influenced, insensibly, by the exercise of that kindly nature which, radiating its benignity on me, and then bestowing its beam and its fructifying influence on the jurors, disposed their minds in his behalf. The judge charged, and charged in a kindly spirit, but omitting no part of the duty exacted by the law, of which he was the exponent. The man was not convicted of murder, but of manslaughter. I can see the jury now, in that room of the City Hall—one of the apartments now occupied by that court over which my friend, Judge Daly, presides—I can see in that dimly-lighted chamber the prisoner, his frame heaving with convulsive sobs, and the handkerchief in which he buried his face, saturated with the perspiration that streamed forth in his agony. I can see, as they entered, the foreman, as he delivered the verdict that restored the trembling criminal to life and hope, and the mild and approving look of the judge, as that verdict was announced. Above all, I can never forget the speechless joy of my client, and the features of his poor wife, imbued with the tenderness and fervor that inspires the humblest peasant girl that treads the green surface of the old land—never shall I forget her, as she fell on her knees, and with clasped hands, and in a voice choking with emotion, breathed in low tones a prayer for the eternal preservation of him whose departure you are here to mourn.

We are told that the ocean, being in absolute repose, if a pebble were dropped in its center, it is possible that the whole deep would be affected, and that the ripple thus created would reach the remotest shore. It is even supposed, by some, that in the transmission of a message over the electric wire, each particle of the metal, from end to end, is moved while the current is being sent forward. Nay, whether it be an effort of profound reasoning or of strong imagination, we have been assured that every word we utter so agitates all space, as to exercise an endless influence over the affairs of the world, and to be felt in some way throughout the universe. Imagination need not carry us so far to afford an assurance that the prayer of that poor woman, in that moment of heartfelt supplication and blessing, is even now pleading in behalf of our friend for the enjoyment of the infinite pleasures which crown a good life.

My poor client was sent to the state prison for a long term of years. His wife almost daily presented herself in my office to learn from me what could be done to effect his deliverance by a pardon. The time at last came when Judge Kent benevolently interfered, and the man was set free.

There came a bright, sparkling, christmas day—and on its glorious morning that poor couple, with joyful and grateful hearts, wended their way to St. Patrick's cathedral, and there, kneeling side by side, and joining in the solemn rites of that old faith, made dear to me by so many sacred memories—the faith in which I live, and in which I mean to die—repeated, with gratitude, with piety, with fervor, the prayer she had before uttered, from the depths of her pure and eloquent heart.

The characteristics of Judge Kent have been described to-day. May I recur to the subject? A prominent and striking feature in his intellectual organization, considered in reference to the ordinary demands of our profession, without confining myself to any particular department of it, was his gentleness of character. I do not mean that his mind had not intrinsically a power to develop all its energies, and to attain success, but it partook of all his nature. It was retreating, rarely satisfied with itself, not endowed with that confidence which we know is so useful to the advocate. He dreaded rude collision of thought—not that he was afraid of any thing that might be said of him, but that he shrank from those assaults which men of hardier natures are accustomed to receive with coolness, repel with vigor, or treat with indifference.

I remember a case, when the community were in a state of fero-

cious excitement, clamoring for the life of an unfortunate man, whom I believed then to be, and still believe to have been, an innocent one ; but who was sacrificed, in my judgment, to the blood-thirsty passions that sometimes sway the public mind. Judge Kent presided at his trial, and, on review, all his rulings were sustained. It occurred, however, to some gentlemen of the Bar, that one step might have been sanctioned in behalf of the accused, without any violation of the strictest legal requirement. That step was not allowed, and the community was loud in its approval of the refusal ; and we, who differed from the public, took the liberty of expressing our dissent. At a public meeting of some members of the Bar, I took occasion to express my opinion to that effect ; though, in my allusions to the judicial action of the deceased, I did not fail to speak of him with that respect which his high character, his position, and his learning, commanded.

Now, this sensitiveness to censure, allied with courage, exhibited itself in Judge Kent. The next time we met he called me to him, and addressed me in a tone and manner that I shall never cease to remember, and in terms that it would be ill-timed and indecorous, perhaps, for me to mention ; but his words impressed me with the conviction that he had a yet nobler character than even, with my high regard for him, I had before ascribed to him. In all my future intercourse with him, from that moment, I could see that if his bearing had changed to me, it was only to become more friendly, and seemed to manifest still more the feminine grace and gentleness which so largely entered into his nature—the natural attendant of his soft tones, and kind manner, his quiet speech, and thought, and feeling.

By some of the gentlemen who have already spoken, we have been informed as to his state of mind when he felt that the hand of death was upon him, and I am happy to hear that he was well prepared to take his leave of earth, and descend to that grave toward which we are all hastening. I do not regard the mere circumstance of physical death with any poignant emotion of grief or sorrow ; but I do contemplate with awe the destruction of an intellect. I can never bear to think, that when the body returns to dust, the mind which animated, vivified and controlled it, is forever lost. I say, with a great writer—

“ Shall that alone which thinks
Be, like the sword, consumed before the sheath,
By sightless lightning ? ”

I think the great dramatist made no greater failure than in his scene where he represents Hamlet holding in his hand the skull of the poor jester. It was an occasion which should have been surrounded with intense feeling, and made eloquent with profound and elevating thought. Shakspeare must here defer to Byron, whose memorable lines you may not regret to hear :

" Look on its broken arch, its ruined wall,
 Its chamber desolate, and portals foul ;
 Yet this was once ambition's airy hall—
 The dome of thought—the palace of the soul.
 Behold, through each lack-lustre eyeless hole,
 The gay recess of wisdom and of wit,
 And passion's host, that never brooked control ;
 Can all saint, sage, or sophist, ever writ,
 People this lonely tower—this tenement refit ?
 Well did'st thou speak, Athena's wisest son :
 ' All that we know is, nothing can be known.' "

We do not believe that this intellect perishes, though the frame may decay and dissolve into its elements. We hold ourselves to be dignified, as we are enlightened and sustained, by that faith to which the older gentlemen who addressed this meeting might more properly refer. We believe in the sweet assurance and the promise so sweetly expressed by that other great poet, Whittier, of whom our country may so justly boast :

" And Thou, oh, most compassionate!
 Who didst stoop to our estate,
 Drinking of the cup we drain,
 Treading in our path of pain.

Through the doubt and mystery,
 Give us but thy steps to see,
 And the grace to draw from thence
 Larger hope and confidence.

Show thy vacant tomb, and let
 As of old, the angels sit
 Whispering by its open door,
 Fear not ! for He has gone before."

Mr. WM. CURTIS NOYES said:

Mr. Chairman: It is impossible to avoid, on such an occasion as this, some repetition, and it is to be hoped that any error of that sort may be excused.

In 1822, an obscure law student, living in a country town, presented to the great Master of Equity Jurisprudence, in this country, an order for the purpose of obtaining his fiat, so that it might be entered by the register. He approached him with awe and diffidence. The order was perused, the magic words written on the back, and kindly he was told, "Young man, now take that to brother Moss." There was something so familiar in the manner and mode of the address, that it led to conversation, and was followed, on his part, by words of encouragement and kindness, which left an impression and produced an effect that never can be forgotten. He was at that time sitting in a small rear room, in his dwelling in Columbia street, in Albany, his table loaded with books and papers, the walls covered with books; and it was there, undoubtedly, that the great legal opinions which have furnished guides for you, and for the judiciary generally, ever since that period, were prepared and sent forth to the world.

At the same time, there was another law student—distinguished—a son of the chancellor of the state of New York, studying law in a town adjoining that already referred to; sitting every day at the feet of one of the wisest men I have ever known, the greatest common lawyer of his day—a man to whom "wisdom, at one entrance, was quite shut out"—and whose teachings were sought by others, like this young law student, anxious to drink in the words of wisdom and learning from his lips.

We know very little of the student life of the one last referred to; but we do know that he led afterward a life of purity, of high professional attainment, of unaffected and unobtrusive piety; that he became a distinguished judge; that he received and laid down academic honors and professorial places; and that, at last, he closed his career by a christian's death.

These two students followed different paths—one sought the interior of the state, the other its commercial metropolis. They met for the first time, at the first young men's political convention ever held, I believe, in the state of New York, in the year 1828; and he who presided over that body, twelve years afterward, when governor of the state (now, as is generally understood, to be the premier of this country, and who is to be "the pilot to weather the storm" to which

allusion has been made, and I trust successfully,) conferred upon one of them the office of circuit judge of the first circuit of the state of New York. That judge was William Kent, whose memory we have now met to honor. A friendship then commenced between these young men (for they were still young men) which has lasted until it has been unfortunately severed by death.

It is not necessary to speak here, and in this presence, particularly of the life of one so well known and so universally esteemed in this community. His large learning, his professional industry, the unspotted integrity which distinguished him in all he did, in public and private, his social worth, his legal qualifications, have all been adverted to in terms of proper commendation.

It may be allowed to speak of his professional integrity here, with a view to its practical uses and the benefit of his example, more in detail. He seems to have fashioned his life, in that respect, upon the model given by the good Bishop Saundeson, in his advice to pleaders :

“Not to think, because he has the liberty of the court, and perhaps the favor of the judge, and that, therefore, his tongue is his own, and he may speak his pleasure to the prejudice of the adversary's person or cause; and not to seek preposterously to win the name of a good lawyer by wresting and perverting good laws; or, the opinion of the best counsellor, by giving the worst and the shrewdest counsel; and not to count it, as Protagoras did, the glory of his profession, by subtlety of wit, and volubility of tongue, to make the worst cause the better; but like a good man, as well as a good orator, to use the power of his tongue to shame wit and impudence, and protect innocence; to crush oppressors and succor the afflicted; to advance justice and equity, and to help them to right that suffer wrong; and to let it be as a ruled case to him, in all his pleadings, not to speak in any cause to wrest judgment.”

A careful observation of his life for more than thirty years (a truth which my brethren will attest), authorizes the remark that, in no case, did he go beyond or fall short of these principles. His mental qualifications, so far as his professional course was concerned, are evident from what has been already said. He was too gentle in his feelings and sympathies, for the rough and harsh methods of trial by jury. He had a great distaste for efforts of that description, and never sought, but rather declined them. But in the argument of cases at bar, in the discussion of strict legal questions, no man was more thorough, none more honest, none more sound and logical, than he.

Allusion is undoubtedly allowable to some of the extraordinary

cases in which he was engaged. They have already been mentioned ; but a participator in some of them may be allowed to speak of him in reference to them. He was engaged, in 1840, in an argument before the court of errors, then consisting of the lieutenant governor, the senate and the chancellor, of the cause involving the constitutionality of the general banking law. He had for his associates and antagonists such men as Ogden, and Spencer, and Sandford, all of whom have gone down to the grave covered with professional honors—and in the discussion of the important questions in that case, upon which, so far as he was concerned, the existence of the Bank of Commerce depended, and the continuance of the best banking system this state has ever known, depended—in the discussion of these questions, he was fully equal to any who were engaged in the case. A reflection was produced by that argument, which may have arisen in the minds of some of his brethren here assembled. He said every thing so pleasantly, so gently, with so little effort, that he seemed to give scarcely any evidence of the power he possessed, and of the industry he had employed in making himself master of the subject. He never appeared to put forward his whole strength ; there seemed to be always behind a reserved power, which he could command at any time, but which he did not think it necessary to bring forward. It was obvious, too, that he made no parade or pretense of learning. Every thing flowed naturally. A beautiful allusion took its proper place without effort. Nothing was strained, nothing forced—all was natural ; showing that what he had acquired had become a part of himself ; was a portion of the man, and had been incorporated thoroughly into his mental constitution.

At a later period of his life, and just four years before the day on which his death was announced, he commenced in the court of appeals, with others, the argument of what has been mentioned as the " Million Trust Case." There he had associates and antagonists with whom, if he was unsuccessful in presenting his views of the case, or inferior in power or learning, the contrast would have been most unfortunate. Of the dead, he was associated with Mr. Butler ; and of the dead, among his antagonists, Mr. Hill and Mr. Beardsley—all honored names in our garner of legal worthies—were ready to watch, and to expose any thing omitted, or improperly urged. By an arrangement between the counsel engaged in that cause, a particular department of it had been assigned to him in the court below, and was, with a confidence that had no doubt, again intrusted to him in the court of appeals. He presneted it, during an argument of two days, occupying

some twelve hours in the whole, in the most forcible, in the clearest, and in the most satisfactory light. It was the mercantile part of the case, the integrity of the accounts, some questions of usury, the nature of the relations between this country and England, in regard to exchange, and the financial rules which regulate dealings in exchange—the whole question of commercial accounts and mercantile usage: and he presented every thing regarding them with a fullness of knowledge, not only of mercantile and general law, but of the financial history of the time, in such a manner that it left none of us the slightest doubt of the success of the cause in that particular.

He was subsequently engaged, as I believe has been already mentioned, in what is known as the Barthrop Will Case. Having been present when he made a portion of his argument, and having gone over the same ground as his substitute in the case, after his health failed him, I may be permitted to say that there the reputation acquired by him was not only not lessened, but increased. It involved the entire doctrine of charitable uses, an inquiry into the civil and ecclesiastical law, as well as the common and statute law of England and of this state; and he made himself master of the subject. Happy will he be who represents the same interest, when the next discussion shall take place, if he can approach to the power and success of the argument which William Kent presented when the cause was in his hands.

And now, Mr. President, nothing is left us but the melancholy duty of paying our tribute of respect to the memory of a good and great man. He has suffered in contrast with his father, having, as has been said, had the misfortune (and in some respects it is a misfortune) of "inheriting a great name." Doubtless, it has its advantages—the advantages of early association—of imbibing, from such a father, day by day, and week by week, almost insensibly, the knowledge which he possesses, and which he willingly pours forth for the benefit of his son. But it has also its disadvantages. If he had been the son of one less distinguished he would, doubtless, have shone with a greater lustre.

It has been said, in reference to meetings of this description, that they are almost entirely eulogistic. In some sense the remark is a true one; but it would be difficult, if not impossible, to select the person who, in reference to him whom we now mourn, would suggest any fault in his character, except that which is common to every one, as a portion of the lot of his humanity.

Happy should we all be that he was one of our number—happy may any Bar be, that has among its members such a man as WILLIAM KENT!

Ex-Recorder TILLOU said:

May I add a few words to the memory of this excellent man? I knew him for many years. I held for him sentiments of respect and admiration. All that has been, on this occasion, said of him, is true. He was, really, a gentleman of many virtues, of extensive learning, of extraordinary abilities. Yet in the picture of his character, which has been so eloquently presented, all its hues and blendings may not have been fully delineated.

His qualities of mind, of thought, of feeling, of judgment; his refined delicacy and sensibility; his modesty; his good sense, and his devotion to truth and fidelity, shone forth in his conduct and his actions. While his talents, his industry and erudition, produced admiration—his kindness of heart, his gentleness, his benevolence of disposition, and his unvarying and graceful affability, secured to him esteem and affection.

Many years ago, when he was circuit judge, I was officially associated with him, in the court of oyer and terminer. The profound learning in criminal law which he then displayed, the ready promptness with which he applied legal principles and decided important questions, and his easy reference to authorities, manifested, as it seemed to me, a rare accuracy of memory and judgment. But, more than these, the candor, compassion and impartiality, the dignity and the uniform suavity with which he presided, compelled respect and attachment. Even the condemned were disarmed of all sense of injustice by his gentleness and kindness.

It is said that the education of Judge Kent, his training, and the good influences which were around him, essentially contributed to form his character. So far as this is applicable to his mental acquisitions, his habits, his professional pursuits, and the direction of his literary tastes, it, no doubt, is true; but his amiable disposition, his affability, his gentleness and pure impulses, were gifts of nature which no art could create, no training could bestow. From these flowed the grace and beauty of his manner; from these, his power over the hearts of others.

It is related of Petrarco, that, upon the trial of a case, he was summoned as a witness, and after the examination of the other witnesses he was called, and that on his offering to be sworn, the magistrate shut the book, and said, "No, Petrarco, your word is sufficient." However questionable may have been the legality of the act, this public homage to that distinguished man was a high honor. Ages have passed, and yet the record of it remains; generations have read

it; ages and future generations will come, and still the record will be read, and the great virtue of truth will, for all time, be known as one of those of which that fascinating poet and scholar was possessed. And this high quality belonged also to Judge Kent: he was its votary, its worshipper, its practiser; he was tenacious in his strict adherence to it, in spirit as well as letter, and therefore was candid in all his statements: no suppression of a fact, no equivocation, no vague, ambiguous statements, would be tolerated by him; the truth he regarded as the basis of honor.

Judge Kent, in his friendships, was fervent, constant and unfaltering, as is verified by all those who stood in that relationship to him. On an occasion similar to this, (the decease of his friend, Judge Edwards,) in this same room, he pronounced a eulogy to the memory of the deceased, eminently impressive and eloquent—long remembered for its elegance and its taste, and for the deep and exquisite feeling which he then manifested.

Again: Judge Kent was not only eminent as an advocate, but as chamber counsel. And herein he was not only a legal adviser, but also a pacificator. Not only did he place before his client a legal view and exposition of his rights and remedies, but presented to him also a statement of the consequences of litigation, whether successful, or unsuccessful, and candidly advised him what was best for his interests, his comfort, or his reputation: his advice was that of a kind friend, as well as counsel.

He was opulent in all that is opulent. He was wealthy in mental acquisition, in a vast store of learning, in a multitude of happy recollections, and in the respect, friendship and attachment of the good, the virtuous and the talented. He was pure in mind, in thought, in impulse. His was an uncommon union of great virtues and great abilities. His life is now a vision of the past—but one which presents a beautiful and interesting episode in human history

INDEX.

A

ABSENT DEFENDANTS.

1. The statutory proceedings for acquiring jurisdiction of absent defendants must be strictly complied with, in order to give the court jurisdiction. *Cook v. Farren*, 95
2. The jurisdiction is strictly statutory, and can only be acquired in the mode prescribed by the statute. *ib*
3. Where an infant defendant, at the time of the commencement of an action for partition, resided in the state of California, and an order for the service of the summons upon her, by publishing the same, was granted, upon an affidavit which did not show that the residence of the infant was unknown to the plaintiff, and could not with reasonable diligence be ascertained; *it was held* that the infant defendant was not properly served with process, so as to give a good title to a purchaser at a sale under the judgment or decree of partition. *ib*

ACTION.

1. A judgment creditor is not obliged to wait until the expiration of the sixty days within which an execution must be returned, before commencing an action to set aside an assignment, executed by the judgment debtor. He may commence such action as soon as the execution issued upon his judgment has been actually returned. *Knauth v. Bassett*, 31

2. Such an action is brought in time, if commenced while the assignee has yet in his hands, unappropriated, moneys belonging to the trust, which it is the object of the action to reach. *ib*

See ASSIGNMENT, 2, 3, 9.

BANKRUPTCY.

DEBTOR AND CREDITOR, 5, 6.

PEWS.

TAXES AND ASSESSMENTS.

ADVERSE POSSESSION.

1. A tenant cannot, while occupying and enjoying the premises under his lease, *originate* a possession hostile or adverse to his landlord. Nor can he, during the same period, *continue* an adverse possession previously commenced. *Corning and Winslow v. Troy Iron and Nail Factory*, 485
2. By taking a lease from the landlord, and holding under it, he acknowledges the landlord's title, and right to convey, and will be deemed to have waived any previous and imperfect rights which he has already acquired, under a prior, incipient adverse possession. *ib*
3. It is erroneous to charge, in an action of ejectment, that an adverse possession by the defendant of the land on and adjacent to the bank of a stream of water, for a sufficient time to mature a title, will be carried, constructively and by operation of law to the center of the stream, without any actual ad-

verse occupancy of the land under water in the stream itself. *Corning & Horner v. Troy Iron and Nail Factory*, 529

4. Adverse possession should not be permitted to prevail, beyond the limits of the actual possession; and such possession must be marked by distinct boundaries. *ib*
5. To give it effect, there must be *actual* occupancy, measured by a distinct, visible and marked, and not by a presumptive or constructive, possession. *ib*

AGREEMENT.

1. *Validity and legality.*

1. In February, 1858, V. leased to S. a dairy farm, with the cows and all the fixtures and dairy implements thereon, for the term of two years from the 15th of March then next, at the annual rent of \$300, to be paid on the 1st of December. The lease contained this clause: "And it is further agreed that the said \$300 shall be paid by the party of the second part, as much earlier than the 1st day of December as the products of said farm can be marketed, to advantage. And it is further covenanted and agreed between the parties that all the produce and products of the farm and cows that shall be raised and made each year shall be and remain to be the property of the party of the first part, until the sum of \$300, rent of each of said years above mentioned shall be paid and said repairs of said year shall have been made, and until all the conditions of this lease, of said year, shall have been fulfilled. And said S. shall have no right to sell or dispose of any of such products without the consent of said V., who shall be present to receive the money, until the above rent shall have been fully paid for said year, and all other stipulations and conditions herein contained, fulfilled. Said S. is to have the right to milk and butter for the use of his own family, and no more, till said rent is paid and all other stipulations and conditions for said year fulfilled." *Held* that the expected products of the dairy and the farm were

the subjects of a grant, as being potentially in existence, and within the power of the lessee, at the date of the lease; and that the grant to V. was absolute and perfect when made, vesting the property in the grantee the moment it should come into existence. *Van Hoozer v. Cory*, 9

2. *Held also*, that the transfer of the products and crops to V. was absolute, and attached to such products and crops as they came into existence, and V.'s title could only be divested by the payment of the rent. That such transfer gave to V. the right of immediate possession, not only as against the lessee, but against all claiming through or under him. *ib*
3. *Held further*, that taking the whole contract together, it was evidently the design that the property in the produce of the farm should be in V. and not in S., until the payment of the rent; and that the contract, as thus interpreted, was not illegal or unreasonable, nor within the rule which prohibits the selling or mortgaging of property not in existence, or not owned, at the time, by the vendor or mortgagor. *ib*
4. The plaintiff was employed by G. to build, for one S. a machine for crushing ore; S. having previously arranged with D. & Co. to pay for the same, and the plaintiff looking to D. & Co. for payment, and commencing work upon the machine. Subsequently D. & Co. refused to pay for the machine, and the plaintiff, on being informed of such refusal, declined proceeding under his contract; whereupon the defendant promised, verbally, that if the plaintiff would go on and complete the machinery, he, the defendant, would pay for it; *Held* that this was not an agreement to pay the debt of another, nor within the statute of frauds. *Quintard v. De Wolf*, 97
5. *Held also*, that the first contract was rescinded and terminated, for all purposes, upon the plaintiff's declining to proceed further with the same; and consequently the agreement of the defendant was not collateral, but an independent and original agreement, and as such was valid and binding. *ib*

6. Where an executrix agreed to pay all the debts of the testator, if her co-executors would give up the whole estate to her, to which they assented, and she thereupon took the assets and paid the debts; it was held that the agreement was founded on a good consideration, and was binding upon her; and that the same having been fully executed on her part, her administrator, after her death, could not gainsay it, nor claim any thing from it, as against any person interested in the remainder. *Lamport v. Beeman*, 239
7. The defendant having employed one C. to excavate a vault, in front of his house, C. hired the plaintiff to do the work. The plaintiff commenced the job, and after working one day, he went to the defendant and declined going on with the job, unless the latter would promise to pay him. The defendant told him to go on and finish the job, and "he should be paid." Held, that the promise was an original and not a collateral undertaking, and was not void by the statute of frauds, but was valid and binding; it not being a promise to answer for the debt or default of C. the contractor, but an absolute promise to pay the plaintiff for a job of work done and to be done, on the premises of the defendant and for his benefit. *INGRAHAM, J. dissented. Devlin v. Woodgate*, 252
8. An action can be sustained, in our courts, on a contract made in Cuba, although not stamped as required by the laws of Cuba. *Skinner v. Tinker*, 333
9. Where a party to an agreement gives notice to the other, of his determination not to perform the same, on his part, performance by the party receiving such notice becomes unnecessary. *ib*
10. On receiving such notice, the party is entitled to damages, if any have been sustained, up to that time, but not to prospective damages. *ib*
11. However discreditable an act may be, in a moral point of view, or as a breach of confidence, it does not follow that the act is on that account to be held a corrupt one, with-
in the meaning of the law, so as to avoid a contract. It must be corrupt as tainted by fraud, or illegal as in violation of some rule of law or some statute, to warrant such a defense. *Moore v. Remington*, 427
12. Where a contract is not, of itself and on its face, necessarily illegal and void, the legal presumption is in favor of its validity. But it is only a presumption, and not a conclusive inference. *Brown v. Brown*, 533
13. A contract for procuring papers, for furnishing information or memoranda, for producing evidence, and for making arguments before the legislature or a committee of that body, in regard to matters of legislative cognizance properly before them, is legal and valid. *ib*
14. But a contract for lobby services, for personal influence, for mere importunities to members of the legislature or other official body, for bribery or corruption, or for seducing or influencing them by any other arguments, persuasions or inducements than such as directly and legitimately bear upon the merits of the pending application, is illegal and against public policy, and void. *ib*
15. Where an agreement is one and entire, if illegal and void in one particular, the illegality penetrates and corrupts the whole agreement, and vitiates it altogether. *ib*
16. In an action upon a contract for personal services, which is held to be illegal and void, the plaintiff cannot recover under the *quantum meruit*, for such of the services rendered as were lawful in their character and not against public policy; where there is no distinct evidence of their value, and they are blended together, and have not been in any way separated or disconnected from the illegal services, and are not in fact capable of such severance or disconnection. *ib*
2. Consideration.
17. The receipt of additional security is a good consideration for an agreement, by the holder of a promissory note, to relinquish all claim upon it,

against an indorser. *Eccleston v. Ogden*, 444

18. A promise to settle and secure the payment of other notes indorsed by the promisee, on which he had been sued by the promisor, and to pay certain expenses on them, followed by the giving of such security, is also a sufficient consideration for such an agreement. *ib*

19. An agreement of that nature, made by the holder of a promissory note, after it becomes due, is sufficient to estop him from suing on the note, in his own name. *ib*

Parol evidence to explain.

20. When a contract is ambiguous, on its face, and it may cover either a legal or an illegal consideration, parol evidence is admissible to determine the intentions of the parties. *Brown v. Brown*, 533

21. Hence, in an action upon a contract for personal services, ambiguous in its terms, parol evidence is admissible, to show what services the parties intended should be performed. This may be shown in a variety of ways; among others, 1. By the declarations and admissions of the parties. 2. By their acts and proceedings under the contract, giving it a practical construction. *ib*

22. The fact that one of the parties is dead, furnishes no sound reason for not receiving evidence of the intent of the other party, as manifested by his declarations. *ib*

See NEW YORK, (CITY OF,) 1, 2.
SHIPS AND SHIP OWNERS, 9.
VENDOR AND PURCHASER, 13, 14,
15, 16, 18, 19, 23 to 27.

ANSWER.

Supplemental. See PRACTICE, 2, 3.

APPEAL.

1. *Generally.*

1. There can be an appeal only from a final judgment. *People ex rel. McSpedon v. Haws*, 69

2. Whenever a case is referred, at a special term, even when the order of reference settles all the essential points at issue, it is nothing but an interlocutory order; and no final judgment can be entered until the coming in of the report. If the party appeals from the order of reference, the appeal will be dismissed. *ib*

3. Where it appears, from the opinion of the judge, that an order denying an application at a special term, was not made for merely discretionary reasons, it is the subject of appeal, and liable to be reversed, if erroneously made. *Artisans' Bank v. Treadwell*, 553

4. Where a judge, at special term, denied an application made by the plaintiff in a judgment recovered against a special partnership, that the receiver should pay the amount of such judgment out of funds of the partnership in his hands, on two grounds: 1. That the judgment and execution could not by law take preference over the demands of the general creditors of the partnership; and, 2. That the receiver's rights took effect, by relation back to the commencement of the action in which he was appointed, which was prior to the plaintiff's lien by execution; *Held* that the decision, upon either of these grounds, was a decision upon the merits of the application. *ib*

5. An order denying to the plaintiffs the exclusive right to a large sum of money may be appropriately said to affect a substantial right, and is therefore appealable. *ib*

2. *From a surrogate.*

6. The petition of appeal from a decree of a surrogate, on the final accounting of an executor, should name the persons who are intended to be made respondents and who are to be called upon to answer. *Brown v. Evans*, 594

7. But where there is a defect of parties, if no motion is made, to stay or dismiss the appeal, on that ground, and the absent parties have neither taken an appeal themselves, nor applied to be made parties to the appeal which has been taken, the

appellate court cannot, upon such appeal, reverse the decree appealed from, even though it should come to the conclusion that the surrogate had erred in his views of the rights of the parties. *ib*

3. *From commissioners of highways.*

See HIGHWAYS, 1, 2, 3.

ARREST.

1. When the facts upon which an order of arrest is granted are the same facts which constitute the cause of action, the order of arrest cannot be discharged; unless the defendant clearly makes out such a case as would call on the judge presiding at the trial to either nonsuit the plaintiff, or direct a verdict for the defendant. *Barret v. Gracie*, 20

2. If A. places an article in the hands of B. to sell, the proceeds over and above the compensation of B., to be paid to A., B. becomes vested with a fiduciary capacity, and in the event of his selling the article, receiving the proceeds, and neglecting to pay over, he is liable to arrest. *ib*

3. Nor is the principle different where a price is fixed, which the agent is directed to realize, net. A principal may limit his agent, as to price, without destroying the fiduciary character. *ib*

ASSESSMENT OF DAMAGES.

See RAIL ROADS, 3, 4, 5, 6.

ASSIGNMENT.

1. One who has conveyed real estate to another, by deed, and who has a right of action against the grantee to have the conveyance declared void, and set aside, on the ground of fraud, undue influence, inadequacy of price, &c. cannot, without possession and without any present estate or interest, assign such right of action to another, so as to enable the assignee to bring an action in his own name, to set aside the conveyance. *McMahon v. Allen*, 56

2. The provision of the code, that "every action must be prosecuted in the name of the real party in interest," was not intended, and has not had the effect, to make things in action or rights of action assignable which were not before assignable even in equity; but was intended to give to the assignee of a thing in action which *was assignable* in equity, a right to sue in his own name. *ib*

3. A mere personal right to avoid a deed on the ground that the grantor has been defrauded, cannot be called a chose in action, within the most extended definition of that phrase. *ib*

4. A contract upon which an action would lie by the personal representatives of a party thereto, in case of his death, for the enforcement of his rights and remedies under the same, is legally assignable. *Sears v. Conover*, 330

5. So held in respect to a written agreement by the defendant to deliver to the plaintiff's assignor all the potatoes the defendant should raise the following season, delivered on the boat, at a specified price per barrel. *ib*

6. A notice given by the assignee of such a contract, to the vendor, that he is ready to pay for the potatoes, on delivery, according to the terms of the contract, is a sufficient notification of readiness on his part. *ib*

7. And if the vendor, at the time of receiving such notice, and with knowledge of the assignment of the contract, refuses to deliver the potatoes, stating that he has sold them to other persons, this will supersede the necessity of any demand after the potatoes are harvested. *ib*

8. If the vendor has sold and delivered the potatoes to other parties, without any notification to the original purchaser, or his assignee, of the time when he would be prepared to deliver them, or requiring him to be prepared to receive and pay for them, and the jury has found for the assignee, generally, in an action brought by him upon the contract, the last sale will be held to have been made in pursuance of the in-

tention manifested by the refusal to deliver the goods to the assignee or to recognize him in the transaction.

ib

9. Although there may be an assignment of a chose in action by parol, yet, to constitute such an assignment, it must be shown that the owner surrendered all control over it, and had made an absolute appropriation of it. *Rupp v. Blanchard*, 627

10. Where a debtor agrees to assign to his creditor a claim which he has against another, in order to make it a valid assignment, the creditor must relinquish his claim against the debtor; otherwise the agreement will be without consideration, and cannot be construed into even an equitable assignment of the claim. *ib*

See DEBTOR AND CREDITOR.

VENDOR AND PURCHASER, 2, 4.

ASSIGNOR AND ASSIGNEE.

See ASSIGNMENT.

ATTACHMENT.

See DEBTOR AND CREDITOR, 10.

ATTORNEY.

See PRINCIPAL AND AGENT, 3.

B

BAILEE.

See BANK NOTES, 2.

BANK NOTES.

1. The old established rule of law that the holder of bills, bank notes, &c., can give a title which he does not possess, to a person taking them *bona fide* for value, is not to be qualified by treating it as essential that the person should take them with

due care and caution; except so far as the want of such care and caution may affect the *bona fides* and honesty of the transaction. *Steinhart v. Boker*, 436

2. Where a bailee, with whom bank notes were deposited by the owner, transferred and delivered to a third person in payment of his own debt, without authority; *Held* that in an action against the latter, by the owner, to recover the value of the notes, it was erroneous for the judge to charge the jury that a person receiving money in good faith, *where there were no suspicious circumstances attending the receipt*, is not bound to inquire into the title of the party from whom he received it, although it might have been stolen, or acquired in a dishonest way. *ib*

See SET OFF.

BANKRUPTCY.

1. Our courts will not recognize or enforce a right or title acquired under a foreign bankrupt law, or foreign bankrupt judicial proceedings. *Moselman v. Caen*, 66
2. Accordingly *held* that an action could not be brought, in the courts of this state, by trustees of the estate and effects of a firm declared by the tribunal of commerce of the city of Brussels, in Belgium, to be insolvent and bankrupt, to recover the possession of certain goods and chattels in the possession of the defendant, in this state, the title and right of possession of which was claimed to have passed to the plaintiffs as such trustees, under and by virtue of such bankrupt proceedings. *ib*

BANKS.

1. Where money is deposited in a bank, generally, to the credit of the depositor, and is not appropriated to the payment of a note of the depositor, held by the bank, or to any other special purpose, the relation of debtor and creditor is created, between the depositor and the bank; the latter becoming a debtor to the

former for the amount deposited, and liable to pay on demand. *Marsh v. Oneida Central Bank*, 298

2. The bank has the right, at any time, to apply the amount in payment of a note past due, but is under no obligation so to apply it. *ib*

3. If it omits to make the application, and postpones it until after the recovery of a judgment upon the note, this will not affect the right. It may apply the money after as well as before the recovery of the judgment, in payment of the debt due from the depositor. *ib*

4. Whether the application is made, or not, is immaterial. If not made, the bank may, in an action by the depositor, or his assignee, to recover the money deposited, avail itself of its judgment as an equitable set-off. *ib*

5. A note, made by W. and payable at the Irving Bank, was discounted by the Seventh Ward Bank. Subsequently, W. formed a partnership with D., under the firm name of W. & Co.; whereupon the firm directed the Irving Bank to charge the notes of W., including the one in question, to the account of W. & Co. Prior to the maturity of the note, W. died, and D. directed the Irving Bank not to charge the individual notes of W. to the account of W. & Co. When the note matured, the Seventh Ward Bank, as the owner thereof, presented it to the paying teller of the Irving Bank, who certified it as paid, and charged the amount to W. & Co. who had not enough funds in the bank to pay it, and W. had no funds there. The Seventh Ward Bank stamped the note "paid." On discovering the mistake of its teller, in certifying the note, and before three o'clock of the same day, the Irving Bank notified the Seventh Ward Bank of the mistake, and requested that the certificate be canceled, which was refused. The Irving Bank then paid to the Seventh Ward Bank the full amount of the note and received the same back, stamped "paid." On the same day, and before three o'clock P. M., the note was again presented at the Irving Bank and payment demanded, and was protested for non-payment,

and notice thereof given to the indorsers. *Held* that the note was not to be deemed paid, and that the Irving Bank could maintain an action thereon, against the indorsers. *Irving Bank v. Wetherald*, 323

See SET OFF.

BILLS OF EXCHANGE.

1. The neglect to present a draft payable on demand, for four days, during which time the drawee fails, will discharge the drawer. *Brady v. Little Miami Rail Road Co.*, 249

2. Where a person residing in New York, and acting as the authorized agent of another, requested a friend at Cincinnati to collect from a corporation there the amount of a dividend due to his principal, upon stock, and to transmit to him a draft for the amount; *Held* that if the agent left New York while expecting the draft, it was his duty to leave authority, with some one, to present the draft, when received. *ib*

3. And that for the negligence of the agent in not presenting such draft for payment within the proper time, the principal was responsible. *ib*

4. Drawees who accept a bill of exchange or draft, after it is received by the holders, for a full and valuable consideration, are liable as acceptors; and cannot avoid their liability on the ground that the bill or draft was not actually accepted by them, at the time it was transferred to the holders. *Bank of Louisville v. Ellery*, 630

5. It will be intended, in such a case, that the drawees authorized the drawer to draw the bill on them, before the holders discounted it, and that the holders advanced their money on the faith of such authority. *Per LEONARD, J.* *ib*

6. The action of the drawer, in making the draft, will be held ratified by the drawees, by their act of acceptance. *ib*

See BANK NOTES.

BONA FIDE PURCHASERS.

See DEBTOR AND CREDITOR, 10.

BROKER.

1. Although a broker's compensation is earned on the completion of his service, which terminates when the vendor and vendee have *agreed*, yet there must be an agreement by which the parties are legally bound. *Barnard v. Monnot*, 90
2. On a negotiation for the sale of real estate the parties must agree upon the terms, and the contract must be formally reduced to writing and executed by them, before the broker will be entitled to his commissions. *ib*
3. Where a negotiation, conducted by a broker, is broken off before any binding agreement is entered into between the parties, and thereupon a new contract is executed by them for a part of the property, only, and varying essentially in its items, from the first, without any agency or intervention of the broker, the latter will not be entitled to a commission. *ib*

BROOKLYN (CITY OF).

See MUNICIPAL CORPORATIONS.

C

CASES APPROVED, DISAPPROVED, COMMENTED ON, &c.

1. The case of *Barger v. Durrin* (22 Barb. 68) disapproved. *Pickett v. King*, 193
2. The cases of *Frost v. McCarger* (14 How. Pr. Rep. 131) approved. The cases of *Union Bank v. Mott* (6 Ab. 315,) *Hernandez v. Carnobeli*, (4 Duer, 642,) and *Republic of Mexico v. Arrangois*, (10 How. Pr. Rep. 1,) commented on. *Barret v. Gracie*, 20
3. *Mallory v. Gillett* (21 N. Y. Rep. 412) commented upon, and distinguished from the present case. *Quintard v. De Wolf*, 97

4. *Prindle v. Caruthers* (15 N. Y. Rep. 425) considered, and distinguished from the present case. *Spear v. Downing*, 522

CERTIFICATE.

See MUNICIPAL CORPORATIONS, 4.

CHOSE IN ACTION.

See ASSIGNMENT, 3, 9.

COMMISSIONS.

See BROKER.

COMMON SCHOOLS.

See ELECTIONS.

COMPLAINT.

1. Substantial and radical defects in a complaint may be reached under the general allegation, in a demurrer, that the complaint does not state facts sufficient to constitute a cause of action. *Spear v. Downing*, 525
2. Under section 162 of the code, relative to actions upon "an instrument for the payment of money only," the instrument set forth in the complaint must be an instrument on its face *apparently* valid; certainly one not *clearly* void. *ib*
3. In an action upon the following instrument, "I hereby agree to pay Miss A. Y. twenty dollars per month during her natural life, for her attention to my son J. S. M.," it was *held* that, to make the signer liable, the complaint should aver that the "attention" was bestowed, either in pursuance of a *request* previously made, or that it was in its nature *beneficial* to the party promising, so as to operate as a reasonable and probable consideration for the promise. PECKHAM, J. dissented. *ib*
4. Courts ought not to extend the application of section 162 of the code

beyond the probable intent of the legislature; or to give a party the benefit of a cause of action by an indirect mode of averment, when he would not have had it if he had put his allegations in proper form, and in express terms. *Per HOGBOOM, J.* ib

5. Where a consideration is not implied, or a request is essential to the defendant's liability, it is of the gist of the action, and must be specially averred. ib

6. When the question of the defendant's liability turns upon the inquiry for whom, or at whose request the services were rendered, the absence of any allegation in the complaint, on that subject, is not aided or cured by the rule that where a contract is susceptible of a two-fold construction, one of which will make it valid and the other void, the legal presumption is in favor of the validity of the contract. *PECKHAM, J.* dissented. ib

individuals, who may change, and not to the office, which does not change. *Shaler and Hall Quarry Co. v. Bliss,* 309

2. The section should be construed as though the words "during their continuance in office" had been added, at the end thereof. ib

3. Accordingly held that the trustees who have neglected to make their report are not personally liable for debts not contracted until after they have ceased to be trustees of the company. ib

4. In an action by a banking corporation, as indorsee of a bill of exchange, the defendant cannot insist, at the trial, that it is incumbent on the plaintiff to prove its authority to purchase drafts of that character. *Bank of Louisville v. Ellery,* 630

5. The defendant should move for a dismissal of the complaint on that ground. ib

COMPOSITION DEED.

1. Where a composition deed contains a condition that if any one of the composition notes is not paid, at maturity, the original indebtedness shall revive, a mere notice from the makers, that the notes will not be paid, will not excuse the holders from demanding payment, at the place where the notes are made payable. *Green v. McArthur,* 450

2. If the makers of the notes place the money in the bank, to pay them, the failure to pay does not occur, and the original debt is not revived; notwithstanding such notice. ib

CORPORATIONS.

1. The liability of trustees of a corporation, for failing to make the annual report required by the 12th section of the act of February 17, 1848, authorizing the formation of corporations for manufacturing, mining, mechanical or chemical purposes, is in the nature of a penalty or punishment for the omission of a duty. The liability attaches to the

CONSTITUTIONAL LAW.

1. The act of the legislature, passed July 10, 1851, releasing all rail road corporations within the state from any liability to pay tolls upon freight, and repealing the existing statutes imposing such obligation upon them, was not in violation of any part of the constitution of the state of New York. *The People v. New York Central Rail Road Co.,* 123

2. The act of the legislature, of April 14, 1860, to confirm a grant or resolution of the common council of the city of New York, passed in 1853, authorizing the construction of a rail road in certain streets and avenues in said city, (the Ninth Avenue Rail Road,) and to authorize the construction of said rail road, was valid and constitutional. *People v. Law,* 494. *Wetmore v. Law,* 515

COUNTER-CLAIM.

1. The defendant purchased a lot of land of the plaintiff, giving back a mortgage upon the premises, to se-

cure a portion of the purchase money; and there being, at the time, a dwelling house upon the land, which projected over the adjoining lot, the mortgagor, for the purpose of protecting his title, purchased the adjoining lot. *Held* that upon the mortgagee bringing an action to foreclose the mortgage, the mortgagor could not set up these facts by way of counter-claim, and ask for damages for the portion of the house which stood on the adjoining lot. *Moore v. Remington*, 427

2. A counter-claim, under the code, may be either for liquidated or unliquidated damages, if they arise upon contract. *Schubart v. Harteau*, 447

3. Where a claim is prosecuted by a plaintiff against a defendant who has a claim against the plaintiff and others, on contract, the defendant may set up the same as a counter-claim, and recover any balance against the plaintiff over the plaintiff's claim, unless the plaintiff replies to the counter-claim that there are other persons liable with him as partners. *ib*

4. In such a case the counter-claim is good, so far as to be a set-off against the plaintiff's claim to that amount. *ib*

See SET OFF.

D

DAMAGES.

See AGREEMENT, 10, 16.

VENDOR AND PURCHASER, 18, 19, 20, 21, 22, 27.

DEBTOR AND CREDITOR.

Assignments for benefit of creditors.

1. Although the law is now settled, by the decision of the court of appeals in *Wilson v. Robertson*, (21 N. Y. Rep. 587,) that the appropriation, by an insolvent firm, of partnership property to the payment of the individual debts of one of the partners, is fraudulent and renders the assignment void, as to creditors of the firm; yet an assignment which purports to be an assignment of all

individual as well as of all partnership property, is not fraudulent and void on its face, where there is nothing appearing thereon to show that all the partners may not have had individual property, when the assignment was made, more than sufficient to pay their individual debts preferred by the assignment. *Knauth v. Bassett*, 81

2. If in fact the assignment includes sufficient individual property of each partner to pay his individual debts directed to be paid by the assignee, such a direction will not render the assignment void. *ib*

3. It is, under such circumstances, for the assignors and their assignee to show, affirmatively and satisfactorily, that the individual property of each partner was sufficient to pay his preferred individual debts. *ib*

4. If that fact is not satisfactorily shown, the assignment will be held to be fraudulent and void, as against judgment and execution creditors of the assignors. *ib*

5. A judgment creditor is not obliged to wait until the expiration of the sixty days within which an execution must be returned, before commencing an action to set aside an assignment executed by the judgment debtor. He may commence such action as soon as the execution issued upon his judgment has been actually returned. *ib*

6. Such an action is brought in time, if commenced while the assignee has yet in his hands, unappropriated, moneys belonging to the trust, which it is the object of the action to reach. *ib*

7. A provision, in an assignment for the benefit of creditors, which authorizes the assignee to pay all reasonable expenses, costs, charges and commissions attending the execution thereof, with a reasonable and lawful commission for the services of the assignees, does not render the assignment void. *Halstead v. Gordon*, 422

8. Nor will a clause authorizing the property to be sold at private sale, avoid an assignment. *ib*

9. A clause directing the assignees to sell and dispose of the property at public or private sale, as he may deem most beneficial to the interests of the creditors, is to be understood as applying to the mode of selling; viz. either at public or private sale, and not as authorizing a sale on credit. *ib*

10. B., being indebted to the plaintiffs, he, for the purpose of paying and securing the amount of their claims, on the 3d day of November, 1857, at the city of Troy, in the state of New York, by a valid instrument in writing executed under his hand and seal, sold and assigned to the plaintiffs 41 iron safes then being in Chicago, in the state of Illinois. The plaintiffs proceeded without delay, to take possession of the safes; but before they were able to do so, or to make any demand of the same, the defendants, on the 5th of November, 1857, levied upon the safes, at Chicago, as the property of B., by attachments sued out of the court of common pleas of Cook county, Illinois, by them. The property was sold under executions issued upon judgments perfected in the attachment suits, and never came into the possession of the plaintiffs. One of the plaintiffs resided in the state of Ohio, but all the other parties, plaintiff and defendant, together with B., resided and did business in the state of New York, where the plaintiffs' debts as well as those upon which the attachments issued, were contracted. *Held*, 1. That the rights of the parties were to be determined by the laws of New York, and not by those of Illinois. 2. That the title to the property having been changed, by a valid sale and transfer thereof from B. to the plaintiffs, before the levy of the defendants' attachments thereon, the plaintiffs had the prior right. 3. That the plaintiffs not being either parties or privies to the proceedings and judgments in the attachment suits, in Illinois, were not bound by them, nor estopped from contesting, in the courts of New York, the title to the property. 4. That if the assignment was valid, and passed the title to the safes, as against B., it was equally valid as against the defendants, who were only creditors at large, and not in a position to at-

tack the assignment as fraudulent. That the act of attaching, as creditors at large, the assigned property, did not put the defendants upon the footing of *bona fide* purchasers for value without notice, so as to enable them to call in question the validity of the act of B. in disposing of the property. *Gould, J. dissented.*
Vanbuskirk v. Warren, 457

11. A provision, in an assignment made for the benefit of creditors, authorizing the assignee to "manage and improve" the assigned estate, renders the assignment on its face fraudulent and void. *Schlusell v. Willett,* 615

12. An action will not lie, in favor of a *simple contract creditor*, against the assignee of the debtor under an assignment for the benefit of creditors, and others, to compel the assignee to account for the assigned property, and to pay the value of property alleged to have been fraudulently left in the hands of the assignor, and by him converted to his own use; to compel another defendant to pay the value of certain property of the assignor, alleged to have been sold at auction, by the assignee, for the benefit of such defendant, for less than its value, by collusion, and without due notice; to compel the defendants to pay the value of other property alleged to have been sold at auction to one of the defendants, for less than its value, by collusion; to compel the assignee to account for and pay the value of lands alleged to have been fraudulently conveyed to him, without consideration, by the assignor, previous to the assignment; to set aside deeds to another defendant, alleged to have been executed by the assignor, before the assignment, as fraudulent and void and without consideration; to compel the delivery of the possession of the premises thus conveyed; and to obtain judgment against the assignee for the amount of the plaintiff's claim. A judgment must first be obtained, by the plaintiff, and the remedy at law exhausted, *it seems.* *Willets v. Vandenburg,* 424

See COMPOSITION DEED.

LIMITATIONS, STATUTE OF, 1, 2.

DEED.

1. Where premises, conveyed by deed, are bounded, in general terms, by a street, the grant extends to the middle of the street, and this, whether the land be situated in the country or in a city. *People ex rel. Earl v. Law*, 494
2. In either case the owners of the lands adjoining the street have the entire property in the land, subject to the public easement and rights in the street. *ib*
3. Accordingly, the adjacent proprietors, having the title to the center of the street, subject only to the public easement, they have a right of property in the streets, which the courts are bound to protect; and which cannot be taken from the owners, except for public use, and upon full compensation. *ib*
4. A description, bounding premises generally, on or by a street, or highway, or stream of water, not navigable, unexplained, carries the boundary to the center of the street or highway, or stream of water. *Wetmore v. Law*, 515
5. But where premises were described, in deeds, as "beginning at the corner formed by the intersection of the easterly line of Greenwich street with the northerly line of Chambers street," and then followed a line southeasterly along the line of Chambers street, then a line perpendicular to Chambers street, then a line "parallel with that of Chambers street, 109 feet to the said easterly line of Greenwich street, and thence southwardly along the same, 79 feet and eight inches to the place of beginning;" it was held that the description bounded the grantees to the easterly line of Greenwich street, and did not carry them to the center of the street. *ib*
6. A reservation, in a deed, is always of something issuing or coming out of the thing or property granted, and is not a part of the thing itself. And, to be a good reservation, it must be to the grantor or party executing it, and not to a stranger to the deed. *Ives v. Van Aulen*, 556

7. Where the plaintiff, being the owner of land on which there was a well of water, conveyed the land to T., "reserving a privilege in the well, for the lots owned by B. on the east and D. on the west," it was held, 1. That this was a reservation, and not an exception. 2. That the rule of law, in construing such a reservation, is to hold to a strict construction of the words used, as against the grantor; and in case of any uncertainty or ambiguity, the party against whom the reservation is made is entitled to the benefit of it. 3. That under this rule of construction the reservation was inoperative, for the reason that it was not made to the grantor, and the clause did not admit of a construction which would give it to him; and that it could not be made to a stranger to the deed. 4. That the clause was to be construed as a reservation to B. and D., and not to the grantors; notwithstanding the fact that the latter, at the time of making the conveyance to T., was in possession of the D. lot, under a contract to purchase the same. *ib*

See DIVERSION OF WATER, 3.

DEMURRER.

See COMPLAINT.

DETERMINATION OF CLAIMS TO REAL ESTATE.

1. To authorize a proceeding under the statute for the determination of claims to real estate (2 R. S. 312) the claim of the defendant must be adverse to the party in possession. *Onderdonk v. Mott*, 106
2. Proceedings cannot be instituted by one having a life estate in premises, under a will, against the devisees in remainder. Nor can they be instituted by one who is not in possession. *ib*

DEVISEES.

See JURISDICTION, 3.

DIVERSION OF WATER.

1. The defendants, having a long lease of premises, embracing a water power, diverted the stream from its natural channel, for the use of their machinery. *Held* that there was no ground for the imputation of bad faith against the lessors, or of an implied consent to the *perpetual* diversion of the waters, from their not protesting against such diversion, at the time; inasmuch as the lessors might well have supposed that such diversion was only intended to be temporary, and the diverted waters were to be restored, at the end of the term. And that it was only upon the ground of bad faith, or implied consent, that the doctrine of equitable estoppel could arise, in such a case. *Corning & Winslow v. Troy Iron and Nail Factory*, 485
2. And the plaintiffs having purchased the premises from the lessors long after the diversion had been made, and the expenditures of the defendants consequent thereon had been incurred, and having commenced a suit for damages, within a short time thereafter, it was further *held* that the doctrine of estoppel did not arise against *them*. *GOULD, J.* dissented. *ib*
3. And the plaintiffs having taken an absolute conveyance of the premises, without any reservation, it was *held* that the deed must be regarded as passing not only the title to the land, and the water, but the water power, and all the rights and privileges which belonged to the grantors as riparian proprietors. *ib*
4. *Held further*, that neither the neglect of the plaintiffs to use or appropriate the water power, hitherto; the comparatively inconsiderable actual damage which they had as yet sustained; nor the heavy expenditures to which the defendants would be subjected if enjoined from the further use of the diverted waters and compelled to restore them to their natural and accustomed channel, presented any insuperable objections to equitable relief to the plaintiffs, by injunction to restrain the defendants from diverting the water, and drawing and using the same by means of such diversion,

and by decree compelling them to restore the waters to their natural bed or channel, and to pay damages to the plaintiffs. *ib*

5. A party may resort to a court of equity, for relief, in such a case, instead of proceeding by action at law, for damages. *ib*

E

EJECTMENT.

See ADVERSE POSSESSION.

ELECTIONS.

1. Where one, who is an inspector of elections for common schools, in one of the ward districts in the city of New York, is a candidate for the office of trustee of common schools in that ward, his office as an inspector becomes vacant, and it is irregular for him to act as such. *People ex rel. Crimmins v. McManus*, 620
2. But if there are two lawful inspectors, they are competent to act, without him, and the fact that his office was vacant will not render the proceedings of the other two inspectors, or the ballots of the voters, invalid. *ib*
3. Where, at an election for trustees of common schools, in the city of New York, ballots were headed or designated for "trustees of *public* schools," instead of *common* schools, as the office is called in the statute; *it was held* that the *intention* of the voters was fully manifested; there being no trustees to be voted for at that election, except trustees of common schools. *ib*
4. *Held also*, that the intention of the voters was not here a question of fact, for the jury, but of law, for the court; and that, as matter of law, the candidates receiving ballots thus headed were entitled to have them counted. *ib*

5. The statute requiring the ballots to be indorsed in a particular manner is directory, only, and not imperative; and there is no nullifying clause, in case the direction of the statute in this respect be omitted. *ib*
6. Where there is no evidence to show that relators, claiming to have been elected to an office, were ever notified of their election, the objection that they have not taken the oath of office is not tenable. *ib*

EQUITY.

See DIVERSION OF WATER, 5.

ESTOPPEL.

See DIVERSION OF WATER, 1, 2.
FORMER SUIT OR RECOVERY.

EVIDENCE.

1. Upon an answer setting up the non-joinder of other persons as co-defendants, articles of copartnership are admissible to prove a partnership between the defendants and the persons omitted. *Kayser v. Sichel*, 84
2. But where the answer alleged that two persons not joined were partners of the defendants, and the articles produced showed that there was only one partner not joined, it was held that the articles were properly excluded. *ib*
3. Where there are several causes of action embraced in the same complaint, and the recovery appears to be general, parol evidence is competent, to show upon which cause or causes of action specified the trial was had and judgment obtained. *Stedman v. Patchin*, 218
4. Such evidence does not contradict the record, unless the party is allowed to show that the judgment was upon a cause of action not specified in the complaint. *ib*

See AGREEMENT.
PRACTICE.

EXECUTION.

Although, to constitute a *levy*, the officer must see the goods, and they must be within his power—at least so far as to assert title to them in the presence of those who obstruct the execution of his process—it is not necessary that the debtor, or owner of the goods, shall acquiesce in the levy. *Artisans' Bank v. Treadwell*, 553

See EXEMPT PROPERTY.
JUSTICES' COURTS.

EXECUTORS AND ADMINISTRATORS.

See HEIRS AND DEVISEES, 1.
WITNESS.

EXEMPT PROPERTY.

A *threshing machine* is not exempt from levy and sale on execution, under the act of April 11, 1842, to extend the exemption of household furniture and working tools from distress for rent, and sale under execution. *Ford v. Johnson*, 364

F

FORMER SUIT OR RECOVERY.

1. An agreement was entered into between the parties, by which the plaintiff was to work for the defendants for a year, commencing January 1, 1857, at \$75 per month. On the 15th of April, 1857, the plaintiff was paid in full to that day, and was, at his own request, and with the consent of the defendants, discharged from their employment. On the 1st of September, 1857, he tendered his services to the defendants, and repeatedly did so, until the end of the year 1857. In November, 1857, he sued the defendants for two months' wages, viz. for *September* and *October*, 1857. The defendants putting in no answer, judgment was taken against them by default. The present action was brought, upon the same contract, to recover wages for the months of *November* and *Decem-*

ber, 1857. *Held* that the defendants were not estopped by the record of the recovery in the former action, from showing that the agreement between the parties had been *vacated* by mutual consent. *Van Alstyne v. Indiana, Pittsburgh &c. Rail Road Co.*, 28

2. Persons not made parties to a former action are not barred or estopped from raising, in a subsequent action, questions not raised or passed upon in the former. *Knauth v. Bassett*, 31

3. A former suit, brought by the holder of a promissory note, against the maker, for the consideration for which the note was given, and a verdict and judgment for the defendant therein, is no bar to an action upon the note, by the holder against the maker. *Slauson v. Englehart*, 198

4. Where the second action involves no inquiry into the merits of the former judgment, and is sustainable on grounds entirely independent of such former judgment, it will not be barred. 4b

FISHERY.

See OYSTERS.

FRAUD.

See STATUTES.

VENDOR AND PURCHASER, 11.

FRAUDS, STATUTE OF.

See AGREEMENT, 4, 7.

G

GRANT.

See DEED.

OYSTERS.

GUARANTY.

One who has, by an instrument indorsed upon a lease, guaranteed the fulfillment of the covenants in the

lease by the lessees, is bound by his guaranty, although the lease is executed by only one of the lessees; where it appears that both lessees occupied the demised premises, and had possession of all the personal property mentioned in the lease, for the whole term. *McLaughlin v. McGovern*, 208

H

HEIRS AND DEVISEES.

1. Heirs or devisees can compel an executor or administrator to pay the purchase money remaining unpaid upon lands purchased by the testator or intestate and held by him under a contract, at the time of his death, out of the assets in the hands of such executor or administrator. *Lamport v. Beeman*, 239

2. The contract debt, for the purchase money, is not a mortgage, within the intent and meaning of the statute making mortgages given by an ancestor or testator a charge upon the land descending to an heir or passing to a devisee, to be paid by the heir or devisee, unless there be an express direction to the contrary in the will. (1 R. S. 559, § 4.) 4b

3. The provision of the statute is confined exclusively to lands descending or passing by devise, subject to a mortgage "executed by any ancestor or testator." It refers to no other charge or incumbrance whatever, legal or equitable. 4b

See VENDOR AND PURCHASER, 5.

HIGHWAYS.

1. An order was made by commissioners of highways, laying out a highway, from which four individuals appealed, separately, to the county judge, who thereupon appointed three referees to hear and determine the same. The appeals were all heard together, at one and the same time, and the determination of the commissioners affirmed, four separate orders of affirmance being made. *Held* that the referees were

not entitled to receive compensation for their services, each, at the rate of \$2 per day, for each appeal, but that each referee was only entitled to \$2 per day for the time he was employed in hearing and determining the question referred to them in regard to laying out the road, without reference to the number of appeals or appellants. *Disosway v. Winant*, 578

2. Whatever may be the number of appeals, there should be but one set of referees, but one proceeding, or hearing and determination, and only one order to signify what that determination is. *ib*

3. Where an order of commissioners of highways, laying out a highway, is affirmed by referees, on appeal to the county judge, the fees of the referees are to be paid by the parties appealing. If there are several appellants, the obligation to pay is joint and several, and may be enforced in an action by the referees, or their assignee, against one, only, as well as in an action against all the appellants. *ib*

4. Requisites and sufficiency of an application to commissioners of highways for the laying out of a private road under the statute. (*Laws of 1853, ch. 174, § 1.*) *People v. Taylor*, 481

5. If the application contains a sufficient description of the land required, to enable the owner to understand what portion of his lands is intended to be taken, and the jury intelligently to determine upon the necessity of the road, and to assess the damages, the intent of the statute is satisfied. *ib*

6. Where, although it did not expressly appear that the jurors were freeholders, no objection was made on that ground, and the parties agreed upon the six persons on the list who afterwards acted as jurors, in making the assessment; it was held that the absence of proof that any of them were not freeholders; the failure to object on that ground; and the express assent to the jurors, was sufficient proof that they possessed the necessary constitutional and

statutory qualifications; or at least amounted to a waiver of the constitutional provision made for the party's own benefit. *ib*

7. The owner of the land cannot object that the terminus of the road actually laid out is different from that applied for, where it appears that though described under different names the termini are identical. *ib*

See STREETS.

HOLDER.

See BANK NOTES.

I

INFANTS.

See JURISDICTION.

INJUNCTION.

In a case of sufficient importance, the cutting of trees standing on the line between adjoining proprietors may be restrained by injunction, *it seems*. *Relyea v. Beaver*, 547

See DIVERSION OF WATER, 4.
RAIL ROADS, 6, 7.

INSURANCE.

1. An insurance company is chargeable with knowledge of all the facts stated by an applicant for insurance, to the company's agent, respecting the applicant's title and interest in the insured premises. And if the applicant, on applying to such agent, for insurance, truly states to him the real condition of the property, he cannot be held to have made any misstatement, or practiced any concealment in reference to the company, notwithstanding the written application varies from such statement. *Hodgkins v. Montgomery Co. Mutual Ins. Company*, 213

2. Among the conditions and stipulations attached to a policy of insurance, and subject to which it was issued and received, were the following: All persons sustaining damage by fire were forthwith to give notice to the company, and within forty days they were to "deliver in a particular account" of such loss or damage. Losses were payable by the company in three months after the loss should have been ascertained and proved and the statement made as above. Then followed this clause: "All communications and notices to the company must be post paid and directed to the secretary, at C." The statement of the loss was made out, sworn to, and deposited in the post office, inclosed in a sealed envelope, postage paid, and addressed to the secretary of the company at C., but was never received by the company. *Held* that the condition requiring the insured to "deliver in" the statement of loss within forty days was a positive requirement of the policy on that particular subject, which could not be deemed superseded or nullified by the general direction to forward communications and notices by mail; and that in sending such statement by mail, the insured had not complied with the conditions of the policy. *ib*

See SHIPS AND SHIP OWNERS, 1 to 6.

J

JUDGMENT.

1. A judgment entered by confession, although it be not confessed in conformity with the provisions of the code, (sec. 382,) is not absolutely and utterly null and void, but voidable at the instance of certain creditors. *Sheldon v. Stryker*, 116
2. So long as it remains unvacated, and apparently in full force upon the records of the court, it cannot be impeached collaterally; and the record thereof should not be rejected when offered in evidence by a sheriff as a justification for taking property. *ib*
3. A subsequent purchaser under the judgment debtor, in order to avail himself of defects in the judgment, must proceed by suit or motion directly against the judgment. *ib*
4. Where facts have arisen since a judgment was entered, of such a nature that it is clear the judgment ought not to be executed, relief against the judgment may be given upon a motion to vacate the same; provided the facts are undisputed. *Wetmore v. Law*, 515
5. Where the ground upon which the judgment was ordered, viz. the absence of any legal sanction to the act enjoined, has since been removed, by authorizing the doing of the act, this will present a prima facie case for the application of the rule. *ib*
5. A judgment is not irregular though not signed by the clerk; at least not void, so as to enable a third person to object to its invalidity on that ground. Signing is not indispensable to its validity. *Artisans' Bank v. Treadwell*, 553

See DEBTOR AND CREDITOR, 10.

JUSTICES' COURTS, 2, 3.

SHIPS AND SHIP OWNERS, 10.

JURISDICTION.

1. The supreme court possesses all the powers and exercises the functions both of the supreme court and the former court of chancery; but it has not acquired, by the blending of the two tribunals, any right or authority which did not belong to one or the other of their formerly separate jurisdictions. *Onderdonk v. Mott*, 106
2. Notwithstanding the attempt to combine law and equity, the action and administration of the court is perfectly distinct in affording legal or equitable remedies; as much so as when the remedies were to be sought in different courts. *ib*
3. Where there is no trust, and there is no personal estate in the distribution of which any trust can arise, devisees who claim merely legal estates in the real property of the testator are not authorized to bring a suit in equity to obtain a judicial construction of the will of the testator. *ib*
4. Where the question to be determined is a purely legal question, concern-

ing the nature of the estates created by a will in the lands devised, it seems the proper remedy is in a court of law, by an action of *ejectment* to be brought by a party claiming the lands, or some portion of them, under one construction of the devise, against another party withholding the possession under another construction. *ib*

5. The whole power of the court to order the sale of the lands of infants is derived from the statute. There is no such original jurisdiction in a court of equity. *ib*
6. If such statutory jurisdiction can be exercised upon bill or complaint, as well as in the ordinary mode by petition, still there is no authority for uniting in such a suit parties who claim a legal title adverse to the infant, and compelling them to litigate that claim and have it passed upon; and there are insuperable objections to such a course. *ib*

See ABSENT DEFENDANTS.
JUSTICES' COURTS, 1, 2.
PRACTICE.

JUSTICES' COURTS.

1. Where the affidavit on which a justice of the peace issues an attachment contains some legal evidence tending to show that the defendant has departed from the county where he last resided, with intent to defraud his creditors, it is sufficient to give the justice jurisdiction, and to uphold his judgment when attacked collaterally. *Kissock v. Grant*, 144
2. And the justice having jurisdiction, his error in subsequently issuing a summons, and holding the cause open until its return, will not render his judgment entirely nugatory. *ib*
3. Such a judgment, though erroneous, is regular and valid until reversed; and an execution issued thereon, and a sale of property upon it, will be regular and lawful, and will not become irregular or unlawful by the subsequent reversal of the judgment. *PARKER, J.* dissented. *ib*
4. It is not a ground of error that when the jury returned, to render their

verdict, in a justice's court, no one appeared or answered for the plaintiff. *McEachron v. Randles*, 301

5. If the plaintiff is present when the jury deliver their verdict, and if, being so present, he is called, before the verdict is received, the fact that no one appears for him, or answers for him, is no ground for not receiving the verdict. *ib*
6. To make the point available as a ground of error, that the directions of the statute have not been complied with, it should be stated that, when the verdict was received, the plaintiff was *absent* and no one appeared or answered for him. *ib*

See WARRANTY, 2, 3.

L

LEASE.

See AGREEMENT, 1.
GUARANTY.

LEGISLATURE.

See TAXES AND TAXATION.

LEVY.

Although, to constitute a *levy*, the officer must see the goods, and they must be within his power—at least so far as to assert title to them in the presence of those who obstruct the execution of his process—it is not necessary that the debtor, or owner of the goods, shall acquiesce in the levy. *Artisans' Bank v. Treadwell*, 553

LEX DOMICILII.

1. The law of the owner's domicile determines the validity of every transfer, alienation or disposition made of personal property by the owner; and the nature and construction of personal contracts is to be controlled by the *lex loci contractus*. *Per WRIGHT, J. Vanbuskirk v. Warren*, 457
2. This is the general rule, *ex comitati*; but a particular state may, by its

statute or customary law, make special provisions in respect to personal property actually within its territory, in favor of its own citizens, as it has entire dominion over it while therein, in point of sovereignty or jurisdiction. *Per* WRIGHT, Justice. *ib*

3. A voluntary transfer of personal property, which is valid by the law of the owner's domicil, is valid every where, unless the law of the particular sovereignty in which it is situated has abrogated, or is in contravention, in special cases, of the general rule of the public law. *Per* WRIGHT, J. *ib*

LEX LOCI CONTRACTUS.

See LEX DOMICILII.

LICENSE.

See NEW YORK (CITY OF), 1, 2.

LIMITATIONS, STATUTE OF.

1. The rule in respect to partial payments remains the same as it was before the code, viz. that in order to take a case out of the statute of limitations they must be made under circumstances to warrant a finding, as a question of fact, that the debtor intended to recognize as subsisting the debt in question, and that he was willing to pay it. *Picket v. King*, 193

2. A debtor, upon assigning his property in trust for the benefit of creditors, parts with all control of the property assigned, and appoints the assignees his trustees to apply the proceeds thereof as directed in the assignment; but they do not become his *agents* in such a sense as to have authority to make any new contract or promise binding upon him, or to make a *payment* upon any of his debts which shall be equivalent to a new and express promise by him. *ib*

3. An assignee is not an *agent* authorized to renew a debt, or take it out of the statute of limitations, as against the assignor. *ib*

4. A temporary absence from the state, without a change of residence, is not the exception contained in the statute of limitations, and does not prevent the running of the statute during such absence. *Hickok v. Bliss*, 321

5. Where a referee finds that the defendant was absent from the state by *various journeys*, at least one year in the aggregate, during the six years, this is not such a finding of absence as will warrant a judgment against the defendant, who has pleaded the statute of limitations. *ib*

6. When one who is principal in a joint and several note, makes a payment of interest at the request of the other joint maker, and it is indorsed on the note, such payment is evidence of a new promise, by both makers, sufficient to take the case out of the statute of limitations. *Munro v. Potter*, 358

See PROMISSORY NOTES.

M

MANDAMUS.

The legislature, by the 6th section of the act of April 17, 1860, empowered the board of supervisors of the county of New York to cause to be raised and collected a sum not exceeding \$80,000, to meet and pay whatever sum, up to that amount, might be found due to the contractors with the commissioners of records; and authorized the comptroller "to pay said amount when the same" should "be judicially determined." *Held* 1. That the legislature did not intend, by the terms "*judicial determination*," a determination by *action* commenced against the board of supervisors, and a judgment recovered in it, before the comptroller should pay the amount; inasmuch as such a remedy did not exist, in favor of the contractors. 2. That the contractors could have no judicial determination except in a proceeding by mandamus; and that in the absence of any specific directions in the act, as to the manner of that determination, it would be unreasonable to infer that any

other mode was intended than that attainable by mandamus. 3. That the proper remedy of the contractors, upon the refusal of the comptroller to pay them the amount certified by the commissioners of records to be due to them, was by mandamus. *People ex rel. McSpedon v. Haws*, 69

MORTGAGE.

1. To secure future advances.

1. The condition of a mortgage may provide for future advances, and specify a *certain sum* sufficiently large to cover the amount of the floating debt intended to be secured thereby. *It seems*, however, that as against creditors or subsequent purchasers without notice, the condition of a mortgage cannot be extended by a contemporaneous or subsequent parol agreement, so as to embrace a debt not within its very terms. *Murray v. Barney*, 336

2. Payment of.

2. Payment of a bond and mortgage extinguishes it. If the payment be of the whole amount secured by the instrument, it extinguishes the same altogether; if of only a part, it extinguishes it *pro tanto*. *Champney v. Coope*, 539
3. There is no exception to this rule, as between the debtor and the creditor, although the security may sometimes, for equitable purposes, be kept alive as between the principal debtor and his surety, where the payment has been made by the latter. *ib*
4. Whether a sum of money received by the creditor, upon the bond and mortgage, amounts to a payment, depends, ordinarily, upon the intent of the party paying or advancing the same. *ib*
5. If intended and declared to apply on the instrument, at the time, and so received, at the time, in total or partial satisfaction thereof, it has that effect; and no subsequent change of intent by the debtor can retroact, or renew the security, without the consent of the parties inter-

ested, and without prejudice to third persons. *ib*

6. Where a mortgage is executed by A. for the benefit of B., the latter is the real debtor, and a payment made by him is equivalent, in its effect upon the bond and mortgage, to a payment by A. It will be deemed a payment for the benefit of A. and by his direction; and as far as it goes, is an extinguishment of the mortgage. *ib*
7. Under such circumstances, the death of A. will terminate whatever agency there may be in B. It will not be presumed that after that event B. had any authority from A. to negotiate the mortgage, or to make any representations as to the validity and sufficiency thereof, which will bind or estop A. *ib*
8. Nor will the fact that B. is the executor of A.'s will, give him authority to make such representations; it not being an act for the benefit of the estate. *ib*
9. Where the plaintiff took from B. a bond and mortgage thus made by A. for B.'s benefit, with an assignment thereof executed by the mortgagee, in part payment of a precedent debt; with knowledge that the bond and mortgage were long overdue; that A., the mortgagor, was dead; that B., as executor of A., had no power to mortgage; that he was embarrassed in his circumstances, and was endeavoring to secure the plaintiff's debt by means of securities which he did not own, and the very possession of which, by him, was some evidence that they were paid, it was *held* that the plaintiff did not present herself with any special equities against A., and could not enforce the mortgage against A.'s estate. *ib*
10. The payment by a debtor, of the amount due upon a bond and mortgage, will operate as a satisfaction, notwithstanding such payment be accompanied by a stipulation and an intent to have the instrument subsequently assigned and kept on foot as valid securities. *ib*

3. *Statute foreclosure of.*

11. The words "personal representatives," used in the statute relative to the foreclosure of mortgages by advertisement, passed May 7, 1844, requiring the notice to be served upon the mortgagor or his personal representatives, means "executors or administrators," and not heirs or devisees. *Anderson v. Austin*, 319

12. Where there is no personal representative to be served with notice, that provision of the statute is inoperative, and the foreclosure will be good if conducted in the mode otherwise prescribed in the statute. *ib*

13. Where mortgaged premises consist of two or more parcels which had previously been held, used and conveyed together, as one farm, a sale of the whole in one parcel is good. *ib*

See COUNTER-CLAIM, 1,
PRINCIPAL AND AGENT, 3.
USURY, 14.

MORTGAGOR AND MORTGAGEE.

Mere delay in foreclosing a mortgage, without any request or notice to foreclose, and where the interest has been paid, is not enough to charge upon the mortgagees the consequences of a fall in the value of the mortgaged property. *Merchants' Ins. Co. v. Hinman*, 410

MUNICIPAL CORPORATIONS.

1. For an injury to the *property* rights of a city corporation, occasioned by the construction of a rail road, the corporation has a right of action, and may prosecute the same, in its own behalf. The people are not the proper representatives of those rights. *People v. Law*, 494

2. To an action by property owners, seeking relief against the construction of a rail road in the streets of a city, on the ground that the grant to construct such road is the grant of a franchise, valuable in itself as a property right, and attempted to be disposed of without consideration, or for an insufficient considera-

tion, and in violation of the provisions of the city charter, the city corporation is a necessary party. *ib*

3. So, where the grounds of relief are based upon the abuse of power, by the city corporation, or its agents or servants, the parties whose action is impeached are necessary parties to the suit. *ib*

4. A contract in writing was entered into, on the 14th of February, 1854, between J. B. and the city of Brooklyn, by which the former agreed to furnish all the materials and do the work necessary to grade and pave Washington avenue and D. street to the Flatbush line, in the manner specified; and the city agreed, in consideration of the due and faithful performance of the contract by J. B., to cause due diligence to be used in laying, confirming and collecting the assessment for the cost of said work, and to pay J. B., his heirs or assigns, the price per running foot therein specified, as the same should become due, and be received into the treasury from said assessment. On the 27th of January, 1855, J. B. made an order in writing, whereby, for value received, he directed the city to pay out of the money due to him on said contract, \$2000, to R. P. or order. In satisfaction of which order, the city, on the 17th of December, 1855, issued a certificate, under its corporate seal, certifying that there would be due from the city to J. B. or R. P. or order, on contract for Washington avenue grading and paving, &c., \$2000, payable upon the surrender of the certificate when the assessments for said improvement should have been collected and paid into the city treasury. In an action by the holder and assignee of the certificate, against the city, for negligence in not collecting the assessments out of which the certificate was payable, it appearing that the assessment upon the property benefited had been duly made and confirmed by the corporation, and a warrant issued in due season, to collect the money, which was returned unsatisfied, for want of purchasers, after the property had been duly advertised and offered for sale: *it was held* that the city was not bound to advertise and offer to sell the prop-

erty a second time, in the hope of obtaining a purchaser; and that it was not guilty of negligence in omitting to do so. *Richardson v. City of Brooklyn*, 569

5. In such a case it is the duty of the contractor, or the holder of the certificate, to attend the sale and bid in the property, for the protection of his own interests, and resell it for his own benefit. *ib*
6. The contractor makes his bargain, and undertakes the work, with express reference to the source from whence he is to receive payment. And if the source proves insufficient to recompense him for what he has done, the statute has provided no means for his indemnity. *Per BROWN, J.* *ib*

N

NEGLIGENCE.

See RAIL ROAD COMPANIES, 1 to 7.

NEW YORK, (CITY OF.)

1. Where the common council of the city of New York enters into a specific agreement with a rail road company, prescribing the regulations to which the latter shall be subject, requiring no further license, and reserving no right to require one, they are concluded by their contract from afterwards passing an ordinance requiring the taking out of a license and the payment of a fee by the company, as a condition precedent to the right to run its cars. *INGRAHAM, J.* dissented. *Mayor &c. of New York v. Second Avenue Rail Road Co.*, 41
2. Such an agreement is neither more nor less than a license; and if it confers the right to run cars in a certain manner, through a specified portion of the city, no subsequent enactment can curtail that right. *ib*
3. By the act of the legislature of April 14, 1860, to confirm a grant or resolution of the common council of the city of New York, passed in 1853,

authorizing the construction of a rail road in certain streets and avenues in said city, (the Ninth Avenue Rail Road) and to authorize the construction of said rail road, it was intended to confirm and make valid the grant or permission conferred by the resolution and action of the common council, whether regular or irregular; whether valid or invalid; whether the consent was sufficiently or imperfectly given. And the effect of the act was a legislative declaration and adjudication that such consent was intended to be given; and their confirmation was based upon that assumption, and the action of the common council intended to be validated. *People v. Law*, 494

4. This the legislature had the power to do, and by the act in question it effectually ratified the action of the common council. *ib*
5. That act intended to confer, and actually conferred, an original grant of power to construct said rail road. It had that effect, independent of the consent of the common council; and it was effectual in form to accomplish that purpose. *ib*
6. The act of April 14, 1860, was valid and constitutional. *ib*
7. The act of April 14, 1860, to confirm a grant or resolution of the common council of the city of New York, passed in 1853, authorizing the construction of a rail road in certain streets and avenues in said city, (the Ninth Avenue Rail Road,) and to authorize the construction of said rail road, was a legal and constitutional exercise of legislative power. It was intended to confirm, and had the effect to confirm, and make valid the resolution of the common council, and to confer by original authority the right to make and construct the rail road therein mentioned. *Wetmore v. Law*, 515

See CONSTITUTIONAL LAW.
MANDAMUS.

NEXT OF KIN.

1. The term "next of kin," as used in the section of the statute authorizing actions to be brought against the

next of kin of any deceased person, to recover the value of any assets that may have been paid to them by an executor or administrator, means those to whom, under the statute of distributions, the personal estate of the deceased would pass. It therefore includes the widow of the deceased. *Merchants' Ins. Co. v. Hinman*, 410

2. Where the shares of the estate belonging to infants have been paid over to their general guardians, the action is properly brought against the infants; and the judgment should direct the money to be paid out of the funds in the hands of the guardians. *ib*
3. The sale, by a widow, of her interest in the assets decreed by the surrogate to be paid over to the next of kin, by the administrator, will leave her liable to creditors of the estate, for the amount of assets received by her assignee, to the same extent as if the same had been received by herself. *ib*
4. If the widow has married again, her husband is not a necessary or proper party to an action brought against her, by a creditor of the estate, for the purpose of recovering the value of assets paid over to her as one of the next of kin, by the administrator. *ib*

NOTICE OF PROTEST.

See PROMISSORY NOTES, 2, 3, 4.

O

OPINIONS OF WITNESSES.

Although great respect should be paid to the opinions of scientific witnesses respecting the cause of an accident, yet they are no more *controlling* than are those of any other class or body of men, when speaking upon subjects which lie within the range of common observation and experience. *Brehm v. Great Western Railway Co.*, 256

OYSTERS.

1. Oysters, planted by an individual in a bed clearly marked out and de-

fined, in the tide waters of a bay or arm of the sea, which is a common fishery to all the inhabitants of the state where the bay or arm of the sea is situated, and where there are no oysters growing spontaneously, at the time, are the property of the person who plants them; and the taking them by another person is a trespass, for which an action lies. *Lowndes v. Dickerson*, 586

2. It is indispensable to the existence of the right of property in oysters thus planted that the bed shall not interfere with the exercise of the common right of fishing; for if the oysters were mingled with and undistinguishable from others, of natural growth, in the public waters, the interest of the person planting them would be subservient to the public use. *Per Brown, J.* *ib*
3. Northport Harbor, being an indentation upon the southern shore of Long Island Sound, is a part of the high seas, with reference to the question of individual ownership of oyster beds planted therein. *ib*
4. Although diverse opinions have been given, in this country and in England, upon the subject, the weight of authority seems to be adverse to the existence of any power in the British crown to grant to an individual the right of taking fish in the sea and in the creeks and arms thereof, in exclusion of the common liberty. *Per Brown, J.* *ib*
5. The right of fishing in the sea is a common right; that is, a right inherent in all the people of the realm, by the common law. It is one of those rights held by the sovereign power, in trust for all the people. *ib*
6. Nothing passes by grant, in derogation of such rights, by implication. *ib*
7. Grants of this description are construed strictly, and an intention to part with any part or portion of such rights will not be presumed, unless clear and special words are used to denote it. *ib*
8. The title to the lands under the waters of Northport Harbor, in Long Island Sound, is not in the town

of Huntington; and the inhabitants thereof have not the exclusive right to take fish therein. *ib*

P

PARTIAL PAYMENTS.

See LIMITATIONS, STATUTE OF, 1.

PARTIES.

1. As between the executor and the heir or devisee of a vendor, a contract for the sale of land is personal estate, and goes to the executor, and not to the heir or devisee. *Adams v. Green*, 176

2. Hence in an action by the devisees of the vendor, against the vendee, to recover the balance of purchase money due upon the contract, the executor of the vendor should be joined as plaintiff. *Johnson, J. dissented.* *ib*

See ASSIGNMENT, 2.

JURISDICTION, 6.

MUNICIPAL CORPORATIONS, 1, 2, 3.

PARTNERSHIP, 7, 8.

PARTNERSHIP.

1. The interest of a partner in the partnership property, consists in his ratable proportion of the assets of the copartnership, after the payment of all the debts. In a suit in equity, for a settlement of the copartnership affairs, no decree can rightfully be made for the payment by one partner of any sum to another, except upon this basis. *Hayes v. Reese*, 151
2. A decree, upon a final accounting between partners, directing one to pay an ascertained balance to another, assumes that the sum so decreed has been duly ascertained to be due to such partner upon a full settlement of the partnership accounts, and after payment of all the partnership debts. *ib*
3. The character, description and amount of the partnership debts is a subject within the necessary and

legitimate scope of the litigation which results in the recovery of a judgment by one partner against another, in such an action. *ib*

4. And if the partner against whom such judgment is recovered is subsequently compelled by legal process to pay partnership debts, to an amount equal to the sum remaining unpaid upon the judgment, this will not entitle him to maintain an action against his former copartners to have the amount of such partnership debts so paid by him ascertained, and for a decree directing that such amount be allowed to him as payment upon the judgment. *ib*

5. His only remedy, it seems, is by a bill of review, or a supplemental bill in the nature of a bill of review. *ib*

6. A partnership that has no limit in respect to time, may be dissolved by either partner, at any time; but such a dissolution will not deprive the other party of any claim for damages which he has sustained prior to the dissolution. Nor would he be authorized to incur new expenses or liabilities in order to carry out the partnership, after notice of dissolution. *Skinner v. Tinker*, 333

7. For a debt owing by all the partners—general and special—in a limited partnership, a suit is well brought against the general partners alone. And a judgment and execution in such suit, levied upon the property of the partnership, will bind the entire interest of all the partners. *Artisans' Bank v. Treadwell*, 553

8. The provision of the statute, that suits in relation to the business of a limited partnership, "may be brought and conducted by and against the general partners, in the same manner as if there were no special partners," must be construed to mean, not only that they may be thus brought "in the same manner," but "with the same effect." *ib*

9. When a limited partnership becomes insolvent, its assets do not, from that time, irrespective of the condition of any creditor's demand, become trust funds for the benefit

of all the creditors of the partnership; so as to prevent a creditor, either by superior diligence or by the favor of the partners, from acquiring or possessing a valid lien thereon in preference to other creditors. *ib*

10. The assets of the partnership are trust funds for the benefit of the creditors equally, except such as by superior vigilance have obtained a lien on the property of the partnership. And they become trust funds for such mode of distribution, so far as any action of the partners is concerned, at the time of insolvency; and so far as the action of creditors is concerned, at the time the court takes possession of the fund, either by decree or by the appointment of a receiver. Until that time, it is the right of every creditor to seek a preference, and to obtain one if he can, by superior vigilance. *ib*

See EVIDENCE, 1, 2.

PAYMENT.

See BANKS.

LIMITATIONS, STATUTE OF, 1, 2, 3.
MORTGAGE, 2 to 10.
PRINCIPAL AND AGENT, 3.
PROMISSORY NOTES, 1.

PERSONAL PROPERTY.

See VENDOR AND PURCHASER, 1, 2.

PEWS.

1. The owner of a pew in a church is not liable *in personam*, in respect to an assessment thereon, unless there be some special ground from which to infer a contract and promise to pay. *St. Paul's Church in Syracuse v. Ford*, 16
2. The interest in a pew, created by a lease in perpetuity, is an interest or estate in realty, and the lessees or pew owners take the title of their pews as real property with all its incidents. *ib*
3. Where a lease of a pew is executed to several persons they are tenants in common of the pew, under their lease, having several and distinct

freeholds, and each being solely and severally seised of his share. *ib*

4. Neither of them can bind the other by an agreement in respect to the common property, but any one can charge his separate and several estate, or can convey it, or mortgage it, or become personally liable upon an undertaking respecting it. *ib*
5. Where several persons, who were tenants in common of a pew, signed a paper by which they covenanted and agreed to and with the church that a former appraisal of the value of such pew should be superseded, and that the wardens and vestry, &c. might make a reappraisal of the value of said pew to any sum not exceeding \$450, and that the pew should be subject to the same annual tax or assessment that it was then liable to; in pursuance of which stipulation the pew was reappraised at \$275; *Held*, in an action against all the owners of the pew, to collect an assessment made upon such reappraisal, that neither of the signers of the paper became bound with, or as surety for the others, nor did any one of them charge his share of the pew for another owner's portion of the tax or assessment; and that consequently a joint action could not be maintained against all the pew owners. *ib*

PLEADING.

1. Where, in an action for the specific performance of a contract for the sale of lands, the answer of the defendant sets up a contract essentially different from that stated in the complaint, the latter, if by parol, cannot be specifically enforced. *Haight v. Child*, 186
2. The code has altered the rule of pleading in such cases. Now, if the defendant admits the making of a contract, and sets out its terms, his answer will be sufficient, although it omits to set up the statute of frauds as a bar. *ib*
3. A party, in pleading, now, need only state the facts he is required to prove, and need not insist on his legal rights under any statute, or draw legal conclusions. *ib*

4. The rule of construing pleadings, under the code—that they are to be construed most favorably to the pleader—though admissible on questions of *form*, is not applicable in regard to the fundamental requisites of a cause of action. *Spear v. Downing*. 522

PRACTICE.

1. Where judgment has been rendered, at a special term, in favor of the plaintiffs, on demurrer to the complaint as being frivolous, and the defendant has appealed from that judgment to the general term, the respondent cannot make a motion—grounded on the frivolousness of the demurrer and of the appeal—that the case be heard out of its order on the enumerated calendar. *Wild-er v. Lane*, 54
2. The legislature, in authorizing supplemental answers, by the 177th section of the code, intended to follow the former chancery rule, by which a defendant in that court was not allowed, in his supplemental answer, to contradict the statements in his first answer. *Slauson v. Englehart*, 198
3. Thus where, in an action upon a promissory note, the defendant, by his answer, put in issue the making of the note and its delivery by him, as well as its transfer to the plaintiff, and then put in a supplemental answer, setting up as a defense a former suit for the same cause of action and a verdict and judgment in favor of the defendant; *Held* that the judge at the circuit decided correctly in compelling the plaintiff to open the case to the jury, and produce his evidence in support of the action, in the first instance, notwithstanding the matter set up in the supplemental answer. 4b
4. Upon a trial of issues of fact, there can be no review, on a motion for a new trial, until there has been some determination of such issues, upon which a judgment may be rendered. *Putnam v. Crombie*, 232
5. While the matter tried is still before the judge, or referee, or jury, undecided, and no judgment can be entered, for that reason, there can be no review, as on a motion for a new trial. 4b
6. The proofs in an action pending before a county court, being closed, the judge, after hearing counsel, drew up a written statement of certain findings of fact, and conclusions of law, which statement was not signed by him, or filed, or delivered to the party in whose favor it was made, nor was any order entered upon it, as a decision of the matters in issue. It recited that certain facts deemed important did not appear from the evidence before the court, and ordered that the parties should produce witnesses before the judge, on a day named, touching those matters. An order was thereupon entered, for the production of such witnesses before the court, on a day specified. On that day the defendant appeared and examined a witness, as to the matters mentioned in the order. The case was thereupon submitted to the county judge, who held the matter under advisement, for the purpose of assessing and fixing the amount to be allowed the defendant, when his term of office expired. *Held* that the trial had, in fact and in law, not been finished when the county judge went out of office, there having been no decision by which he was bound or concluded; and that consequently there was nothing to review, upon a motion for a new trial. A trial of the issues, *de novo*, was therefore ordered. 4b
7. Evidence taken orally, before a former county judge, in an action pending in the county court, cannot be ordered to stand as evidence, upon a new trial of the cause before his successor. 4b
8. The objection to the right of plaintiffs to recover, for want of legal capacity to sue, or of jurisdiction, cannot be raised for the first time on an appeal to the general term. If the defendant omits to take the objection by demurrer, or at the trial, he will be deemed to have waived it. *Mosselman v. Caen*, 66
9. *It seems* that after having failed to demur, the defendant cannot raise the question as to the legal capacity

of the plaintiffs to sue, at the trial.
Per CLERKE, P. J. *ib*

10. Motions for new trials are addressed to the discretion of the court, whether based upon the weight of evidence, surprise, or newly discovered evidence, or the fact that the party has been deprived of his evidence by accident, or other like grounds. In modern practice they are liberally granted, in furtherance of justice. *Platt v. Munroe*, 291

11. In an action against one as joint maker of a promissory note, the defendant set up the defense that the signature of his name was a forgery. The note, shortly before the circuit, was put into the hands of H., a counsellor of the court, to enable him to prepare for the trial, and the cause being put over, the note remained in the hands of H., who died before the next circuit, and the note could not be found, so as to be produced on the trial. The trial was put over by the plaintiff, one circuit, for that cause. The plaintiff being still unable to find the note, the action was finally tried as upon a lost note. The plaintiff called the other maker of the note, as a witness, who testified to the signing of the note by the defendant, but the plaintiff was unable, by reason of the supposed loss of the note, to call witnesses to the handwriting. The defendant proved, by witnesses who had seen the note, that the signature was not his. The jury found a verdict for the defendant. After the trial, the note was found in the possession of one to whom H. had handed it for safe keeping. Upon a case, containing the evidence, and an affidavit stating that he could now prove the signature of the defendant to the note, the plaintiff moved for a new trial. *Held* that under the peculiar circumstances of the case the proper development of the truth, and the advancement of justice, required that a new trial should be granted. *ib*

12. If, upon the undisputed facts of the case, the decision at the circuit is right, a new trial will not be granted, because the judge gave the wrong reason for it. *Munro v. Potter*, 358

13. Where a defendant, by his answer, denies all the facts stated in the complaint, judgment cannot be taken against him, even by default, without evidence. *Patten v. Huzewell*, 421

See ABSENT DEFENDANTS.

PRINCIPAL AND AGENT.

1. Where the defendant was intrusted with a commission to purchase, in the market, for the plaintiff, as his agent, so many shares of the stock of a specified company; *Held* that this required of him to use his best judgment in making the purchase, and to obtain the stock on the most advantageous terms upon which it could be procured from an outside party; and that therefore he was not at liberty to sell his own stock to his employer. *Conkey v. Bond*. 276

2. In such a case, without passing upon, or even looking into the question of actual fraud, the transaction will be avoided on the ground that the agent is in a situation of trust which will not allow him to deal with his own property when his principal has reason to believe he is dealing with another's. The sale cannot be upheld, in the light of the simple and plain duty that every agent, however limited and circumscribed may be his employment, and irrespective of all questions of benefit or advantage to himself, owes to his principal. *ib*

3. When one employs an attorney to loan money for him, and to take a bond and mortgage from the borrower, and after the loan is made, he intrusts the attorney with the possession of the bond and mortgage, and permits him to receive payments upon it, from time to time, and to indorse them for the mortgage, until payments are made which extinguish the principal, the attorney will be held to be, in fact and in law, authorized to receive the latter as well as the former payments; and in case of his omission to pay over the money to his principal, any loss consequent upon his insolvency must fall upon the mort-

gagee, rather than upon the mortgagor. *Hatfield v. Reynolds*, 612

See BILLS OF EXCHANGE, 2, 3.

SHIPS AND SHIP OWNERS, 3, 4, 5.

WARRANTY, 4, 5, 6.

PRINCIPAL AND SURETY.

See SHIPS AND SHIP OWNERS, 10.

PRIORITY OF RIGHT.

See DEBTOR AND CREDITOR, 10.

PROMISSORY NOTES.

1. *It seems*, that when the surety in a joint and several note receives the money of the principal and sends it to the holder of the note, with directions to have it properly indorsed, and it is indorsed accordingly, he cannot relieve himself from the consequences of the indorsement, by assuming to act as an agent merely. *Per MORGAN, J. Munro v. Potter*, 358

2. The statute of 1857, relative to the protest of notes, only alters the law as to service of notice of protest, where the indorser resides or has a place of business in a city or town, or when he is reputed to reside or have a place of business therein, on diligent inquiry. In such cases the service may be by notice through the post office. *Randall v. Smith*, 452

3. Where there is no evidence of any diligence to find the residence of the indorser, or even of any inquiries on the subject being made, the act of 1857 does not apply. *ib*

4. Where the parties to a note made and dated at the city of New York were informed that the indorser resided on Long Island; *held* that this was sufficient to put them on inquiry, and to satisfy them that he did not reside in New York. *ib*

See AGREEMENT, 18, 19.
BANKS, 1, 2.
WITNESS.

R

RAIL ROAD COMPANES.

1. *Liability for injuries to passengers.*

1. Although the mere fact that a person is injured, while being transported in a rail road car, does not impose upon the rail road company the burden of disproving negligence, yet the presumption of a want of care may arise from circumstances attending the injury; and whenever such a state of things exists, the onus is upon the company to show that the injury did not result from any negligence on its part. *Brehm v. Great Western Railway Co.*, 256

2. Accordingly, where a train of cars upon the defendant's road, in which the plaintiff was a passenger, was, in consequence of an embankment having been swept away or submerged, plunged into a gulf of some forty feet in depth, and the plaintiff seriously injured; *Held* that these facts being shown to exist, the presumption of negligence on the part of the defendant necessarily arose; and that it required evidence on the part of the defendant to overcome that presumption and establish affirmatively that no negligence, on its part, existed to which the injury could be attributed. *MORGAN, J. dissented.* *ib*

3. *Held*, also, that it was a question for the jury to decide, upon the whole evidence, whether the defendant had succeeded in removing the presumption of negligence arising from the circumstances of the case and establishing, clearly, that the accident arose either from causes inexplicable, and involving no responsibility on its part; or from the hidden forces of nature, and the interposition of a superior power which no care, skill or precaution on its part could avert or control. *ib*

4. That the refusal to charge that if the injury was caused, in part, by an unforeseen cause, and in part by a cause attributable to negligence, the plaintiff could not recover, was not a ground of exception. If there is a proximate and discoverable cause, which may have produced

- the injury, and which the evidence will warrant the jury in finding was sufficient for that end, it in no respect conduces to the defendant's impunity that another cause existed which was perhaps adequate to the production of the result. *ib*
5. That the judge was not bound to charge that if the defendant employed proper persons to construct and protect the embankment and they were guilty of no negligence in the performance of their duties, the plaintiff could not recover; there being no such ground of exemption, known to the law. *ib*
6. That in refusing to charge that the plaintiff could not recover unless, before the accident, there was some apparent source of danger to the embankment, which it was the duty of the defendant to provide against or remove; and in charging that under such a condition of things the defendant would not be chargeable with negligence, the judge committed no error. *ib*
7. That on the trial of such action the declarations of the engineer of the rail road company, made while actually engaged upon the work, and in respect to its proper construction, were in substance a part of the *res gestæ*, and were therefore admissible in evidence. *ib*
2. *Extra rates of fare; duty to keep office open.*
8. A passenger on the N. Y. Central Rail Road, who applies at the ticket office just in time to procure his ticket, and get on board of the train in safety before its actual departure, and who fails to procure a ticket in consequence of the temporary absence of the ticket agent, cannot be charged an extra rate of fare. *Porter v. New York Central Rail Road Co.*, 358
9. The duty is upon the rail road company to keep the office open until the departure of the train; and the good faith of the conductor in demanding the extra fare, will not relieve the company from the penalty of extortion. *ib*
10. The conductor must be regarded as the agent of the company, in demanding fare of the passengers, and as acting within the scope of his general authority. *ib*
11. *It seems* the company will be liable in such a case, although the conductor acted contrary to orders. *ib*
3. *License in cities.* See *NEW YORK, (CITY OF.)* 1, 2.
4. *Tolls on freight.* See *CONSTITUTIONAL LAW*, 1.

RAIL ROADS.

1. That taking private property for the purposes of a railway, is taking it for public use, is settled by repeated adjudications, and can no longer be regarded as an open question. *People v. Law*; 494
2. Whether the devotion of a street, or highway, in part, to the purpose of a horse rail road. is such a new or additional use as requires a new assessment of damages? *Quære. ib*
3. *It seems* that in all cases where parties are obliged to appeal to the legislature for a grant of the right or power to construct a railway or other improved mode of locomotion, a new assessment of damages should be provided for, and made. *ib*
4. Where this has been done, and provision has been made in a statute chartering a rail road company, for obtaining title in case any person shall own any private right or interest in any of the streets or avenues, over or upon which the rail road is authorized to be laid; and the grantees have accepted the grant with that condition, they must be deemed to have conceded that the nature of the improvement called for a new assessment of damages, or to have stipulated to make the same, in consideration of the benefits acquired by them under the grant. *ib*
5. Hence, the adjoining proprietors will be entitled to compensation for an appropriation of their interest or property in a street, to the public use, by the railway company. And the company has no right to enter upon the premises, and take the

property of such persons, without first making this compensation, or providing means to make the same.

ib

6. If it neglects or refuses to make such compensation, or to provide means to make it, an injunction will be granted, to prevent such an appropriation, until compensation is provided.

ib

7. But the *people*, not being the individual citizens of the state, but the aggregate body of the public, having no property which is traversed or touched by the line of the proposed rail road, and having no private property rights to protect, are not entitled to an injunction.

ib

See CONSTITUTIONAL LAW.

RATIFICATION.

See SHIPS AND SHIP OWNERS, 10.

RECEIVER.

The order appointing a receiver cannot, as against third persons, date or relate back beyond the time of granting it. And it is irregular and improper to insert a clause to that effect in the order. *Artisans' Bank v. Treadwell*, 553

REDEMPTION OF LANDS.

1. When unappropriated lands are resold by the state engineer and surveyor for the non-payment of the purchase price under § 4 of 1 R. S. p. 205, and the same are purchased in for the state under § 47, the former owner, if he intends to redeem, must avail himself of the privilege secured to him by § 48; and repurchase the same within three months thereafter. *Candee v. Haywood*, 349
2. He cannot redeem under § 3 of the act of 1836, (*Sess. Laws of 1836*, p. 699,) for the reason that the redemption provided for in that section applies only to the case of the resale therein mentioned; when the premises, instead of being purchased in for the state, are actually struck off to a third person.

ib

3. The vendee in possession under the first certificate of sale may be *ejected* at the suit of the subsequent purchaser, without being first served with a notice to quit.

ib

4. Nor does he hold adversely, as against the state, so as to avoid the patent granted to the subsequent purchaser. The statute (3 R. S. p. 30, § 167) does not apply to lands owned by the state.

ib

REFEREE.

It is the province of a referee to find the facts, so far as they are deemed necessary to enable the court to pass upon the questions which the appellant desires to review on the appeal. *Murray v. Barney*, 336

RESERVATION.

See DEED, 6, 7.

RIPARIAN PROPRIETORS.

1. Where riparian proprietors own to the center of the stream, that entitles them to have the waters flow in their natural channel, in the bed of the stream. *Corning & Winslow v. Troy Iron & Nail Factory*, 485
2. Where one owns the land only on one side, and to the center of the stream, the right to use the waters, if there be a fall, is a property right which the law will regard as of some value, and which it will not suffer to be invaded or infringed without authority.

ib

S

SALES.

See VENDOR AND PURCHASER. WARRANTY, 1, 4, 5, 6, 7.

SEALED INSTRUMENTS.

1. A party to an instrument under seal, having a subscribing witness, is not

a competent witness to prove its execution. *Per* CLERKE, J. *Kayser v. Sichel*, 84

2. To lay the foundation for the admission of any other evidence than that of the subscribing witness, it is necessary to prove that the latter was not capable of being examined, as that he was dead, or incompetent to give evidence from insanity or infamy of character, or absence in a foreign country, or that he could not be found, after strict and diligent inquiry. *Per* CLERKE, J. *ib*

SET-OFF.

1. Where bills of a bank are obtained by one of its debtors after it becomes insolvent and stops payment, they cannot be used as a set-off or counter-claim, in an action brought by the receiver of the bank, upon a promissory note of the debtor, held by the bank at the time of its failure. *Diven v. Phelps*, 224

2. Under the statute, the moment a moneyed corporation becomes insolvent, the rights of all its creditors attach equally, to all its assets; and whoever takes its bills, afterwards, being indebted to such corporation, takes them subject to this right of all the creditors to share equally in its assets. His claim is upon the assets, for his proportionate share. *ib*

See BANKS, 4.

SHERIFF.

1. Wherever funds converted into cash are held by a sheriff, receiver, or other officer or trustee, any one of the claimants of such fund may make a motion, upon notice to the other parties interested and to the officer holding the funds, for an order directing their payment to him. *Artisans' Bank v. Treadwell*, 553

2. Where a sheriff seizes, by virtue of an attachment, property claimed by a third person under an assignment from the defendant in the attachment, and judgment is subsequently recovered in the attachment suit, by

the plaintiffs therein, the sheriff and such plaintiffs, when sued for the property so seized, may show in their defense that the alleged assignment was fraudulent and void. *Schlüssel v. Willett*, 616

3. And where, on the trial of such an action, it was admitted by the plaintiff that judgment had been previously recovered against the defendant in the attachment suit, it was held that this was a proper case, after the evidence was in without objection, for disregarding the omission to plead the recovery of the judgment; it not being a variance by which the plaintiff was misled. *ib*

See LEVY.

SHIPS AND SHIP OWNERS.

1. Each owner of a ship has a distinct and separate interest as a tenant in common; and may or may not insure his particular share, as he thinks fit. *McCready v. Woodhull*, 80
2. He is under no obligation to insure for the benefit of the others, or to unite with them in insuring. *ib*
3. If he gives authority to an agent, to insure for him, it necessarily means to insure his share; and in order to make him liable jointly with the other owners for a premium on a policy for the whole vessel, the proof must be clear that he gave express authority for that purpose. *ib*
4. Such authority cannot be inferred from the general powers of a ship's husband; it not being a part of his general duty to insure. *ib*
5. If he does this, it must be by a special authority. Instructions from all the owners, to insure, will only authorize him to insure for each separately, to the value of his separate interest. *ib*
6. To make them all liable jointly, each for the other, they must enter into a joint undertaking to that effect, knowingly and expressly. *ib*
7. The right of the master to continue

- in command of a vessel because he is part owner, can only rest on a contract made with the other owners. *Ward v. Ruckman*, 419
8. Even if such a contract is made with one captain, it is not an assignable right, to be transferred with the share, but is personal to the captain with whom it was made. *ib*
9. Such a contract cannot be unlimited, in respect to duration; and where no time is fixed for its continuance, it must be considered as subject to be terminated by either party on reasonable notice, if the interest requires of either a change. *ib*
10. A vessel, while engaged in carrying freight and passengers between Buffalo and Chicago, touched at Cleveland, Ohio, where she was seized by the sheriff, under process issued out of the superior court of Cleveland, at the suit of one McE., upon a claim against the boat, under certain statutes of Ohio. To effect the release of the vessel the master executed a bond, under the statute, with the plaintiff and one P. as sureties, conditioned for the return of the boat to satisfy any judgment upon the claim of McE., or in default thereof, for its payment. The boat was thereupon released, and the defendant, the owner of the boat, being informed of the proceedings of the master, employed counsel and defended the suit commenced by McE., on his own account. *Held*, 1. That it was the duty of the master, from the necessity of the case, and was within his proper power, to execute the bond, and thus enable the vessel to proceed on its way. 2. That the defendant having sanctioned the act of giving the bond, as soon as it came to his knowledge, and proceeded to contest and defend the action in which the bond was given, this approval and ratification of the execution of the bond was equivalent to an antecedent authority to the master. 3. That if the statutes under which the vessel was seized were valid as to the citizens of Ohio, they were equally valid as to all parties litigating in the courts of Ohio in proceedings founded upon them, no matter where such parties resided. 4. That the proceedings and seizure being, for aught that appeared, regular, under the statutes of Ohio, the defendant, by appearing and defending the action, became bound by the judgment of the court in favor of the validity of the plaintiff's claim. That even if he was in fact a bona fide purchaser, so that the claim upon the vessel was not valid as against him, still the judgment would be binding, as long as it remained unreversed; inasmuch as the court had jurisdiction of the subject matter, and of the parties to the action. 5. That the defendant being bound by the judgment that the claim of McE., the plaintiff in that action, against the vessel, was valid, the record of that judgment was conclusive against him in an action by the plaintiff, for the reimbursement of money he had been compelled to pay as one of the sureties in the bond. *Stedman v. Patchin*, 218
- ### SPECIFIC PERFORMANCE.
1. Where, in an action for the specific performance of a contract for the sale of lands, the answer of the defendant sets up a contract essentially different from that stated in the complaint, the latter, if by parol, cannot be specifically enforced. *Haight v. Child*, 186
2. Part payment is not such a part performance as will entitle a vendee of lands to a specific performance. *ib*
3. Taking possession, by the vendee, is not a basis for a specific performance, if the possession has been surrendered by him, and received by the vendor, before the commencement of the action. *ib*
4. A vendor cannot have a decree for a specific performance, where he does not aver and show a readiness and willingness to perform the agreement on his part, but the vendee alleges and proves that he was ready and willing, and offered, to perform the same, and that he demanded a deed, before the commencement of the suit, which was refused. *ib*

STATUTES.

Whether an act of the legislature can be impeached for *fraud* not appearing upon its face; and if so, whether it can be impeached in any other manner than by a direct proceeding for that purpose, in analogy to the mode of impeaching a patent? *Quære. Wetmore v. Law*, 515

See CONSTITUTIONAL LAW.

MANDAMUS.

NEW YORK (CITY OF), 3 to 7.

STREETS.

See DEED, 1 to 5.

RAIL ROADS, 2.

SUPPLEMENTAL ANSWER.

See PRACTICE, 2.

SURROGATE.

See APPEAL, 6, 7.

T

TAXES AND ASSESSMENTS.

One who is the owner in fee and in the possession of real estate, subject to the right of dower of a widow therein, may maintain an action against the widow, under the act of April 12, 1855, to provide for the due apportionment of taxes and assessments, &c., for an adjustment and apportionment of the taxes and assessments which are a lien upon the premises, and for a decree directing the widow to pay her proportion of such taxes and assessments, viz. such portion thereof as has been assessed upon the property set off to her for dower. *Linden v. Graham*, 316

TAXES AND TAXATION.

1. Whether the legislature had, or had not, the constitutional power, originally, to appoint the commissioners of records for the city and county of New York, under whose direction and superintendence certain work

has been done, yet the work having been performed, and the legislature determining that the same was a service rendered to the county, they had the right to tax that portion of the state to pay for it. *People ex rel. McSpedon v. Haws*, 69

2. Although the legislature cannot authorize the taking of the property of an individual, for public purposes, without compensation, or for private purposes with or without compensation, yet it has the absolute power to determine what sums shall be raised by taxation, and the purposes to which they shall be applied. *ib*

3. It can apportion the public burthens among all the tax paying citizens of the state, or among those of a particular section or territorial division. *ib*

4. Where the legislature has deemed it proper to determine that certain work performed by individuals, for a county, is for the public good, and, without any reference to the mode by which they are authorized to enter upon the performance of the work, it has enacted that they shall receive compensation for it, and has taxed the inhabitants of the county for that purpose, it is not a ground of objection that the legislature has not declared the precise amount of the claim, if it has specified a maximum amount of compensation, and has indicated the method by which the actual amount due shall be ascertained. *ib*

See MANDAMUS.

TOLLS.

See CONSTITUTIONAL LAW, 1.

TRESPASS.

1. In an action brought since the code, for trespass on lands, the plaintiff, after having proved acts of trespass committed within the period laid in the complaint, may give evidence of additional acts, committed prior to the earliest day stated in the complaint. *Relyea v. Beaver*, 547

2. The old rule ought not to be enforced, under the code; but the de-

cision should turn upon the materiality of the variance from the allegations in the complaint, and upon the question whether the opposite party has been misled, or will be prejudiced, by the admission of the testimony. *ib*

3. An action of trespass, under the statute, may be maintained by one adjoining proprietor of lands, against another, to recover treble damages for cutting trees standing on the line between the lands of the parties. *ib*
4. And, in a case of sufficient importance, *it seems* such cutting of line trees may be restrained by injunction. *ib*

U

USURY.

1. Whenever a lender stipulates for the chance of an advantage beyond the legal interest, the contract is usurious. *Thomas v. Murray*, 157
2. When promissory notes of equal amounts are exchanged, one is equal in value to the other, and there is no usury in the transaction; but where either party makes an advantage in the arrangement, over and above seven per cent, then the case is one of usury, if the transaction was designed as, or was connected with, a loan of money. *ib*
3. Money is equal to money, in such a transaction, but nothing else is equivalent to money. Where, upon a loan of money, any thing else is claimed to be equivalent to money; the lender must show the equality; and where any other thing than money is put upon a borrower, on an exchange of notes, in connection with, and as a condition of, a loan of money, the transaction is presumptively usurious, in law. *ib*
4. The defendant applied to W. for the loan of \$200. W. said he had a note made by M. for \$150, payable in hemlock lumber, and if the defendant would take that note he, W., would let him have the \$200, and take the defendant's note for \$350. The defendant replied that he did not want the M. note, and did not consider it good. Subsequently the defendant told W. that if he would let him have the \$200 that day, he would take the M. note, provided W. would guaranty it. This W. agreed to do, and thereupon advanced the \$200 in cash to the defendant, and delivered the M. note, with a guaranty indorsed, guarantying the collection thereof, but without any consideration therein expressed, and took from the defendant a note for \$356.97, which embraced the interest on the \$200 and on the \$150 note, &c. *Held* that even upon the assumption that W. was responsible upon his guaranty of the M. note, and that he could not elect to avoid it, the transaction was usurious upon its face, within the case of *Cleveland v. Loder*, (7 Paige, 559.) *ib*
5. But that the contract of guaranty was of no validity, for want of a consideration being expressed therein, and that the note for \$150 being turned out by the lender, upon a void agreement of guaranty as part of the consideration for a loan of \$200, the transaction presented a bald case of usury. *ib*
6. *Held, also*, that the fact that the agreement of W. to guaranty the note meant a *valid* guaranty, did not alter the case. That the contract being executed at the time, and not executory, must be held to express the agreement between the parties, and to furnish, upon its face, the only evidence of the contract actually made. *ib*
7. *Held, further*, that in an action upon the note given by the defendant to W. it was erroneous for the judge to charge the jury that the transaction would not be usurious if, at the time, W. supposed and believed that the M. note was a good note and the parties to it able to pay it, and the bargain between them was a genuine bargain for the sale of the note only, and without any intent to evade the statute. *ib*
8. And that the judge should have left it to the jury to say whether it was part and parcel of the bargain, and the intention of the parties, that the borrower should take the \$150 note

- at his own risk in regard to the solvency of the parties thereto. *ib*
9. One who makes a contract which the law declares usurious, cannot escape the penalty of the offense upon the plea of ignorance of the law, or of the absence of an intention to evade the statute. *ib*
10. The law considers that every man intends the legitimate consequences of his acts. *ib*
11. Where the terms of an agreement alleged to be usurious are doubtful and depend upon conflicting evidence, the supreme court will not review the general conclusion of the referee in favor of the validity of the loan. *Murray v. Barney*, 336
12. It cannot be assumed, without proof, that a bank makes a profit by selling exchange on New York city at one-half of one per cent. But when it is shown that the sale of exchange is a profitable business, and it is a part of the agreement that the borrower shall buy a bill of exchange, as the condition of the loan, the transaction is usurious. *ib*
13. Otherwise, where there is no valid agreement of the kind; but merely an expectation that the borrower will purchase a bill of exchange with which to pay his note, when it afterwards matures in the city of New York. *Semble*. *ib*
14. The defendants, F. and L., after executing two mortgages to secure the plaintiff's claims, conveyed the mortgaged premises, by deed with covenants of warranty, to H. Fitzhugh, jun., but without consideration. They subsequently took back two mortgages from H. Fitzhugh, jun., to secure the payment of over \$30,000; and afterwards, when they failed, executed an assignment of certain property, including their own mortgages to the plaintiff and the two mortgages from H. Fitzhugh, jun., to the defendants, Barney, Hubbard & Durbin; subject to the payment of the plaintiff's demand in this action. In order to carry out and perfect this assignment, H. Fitzhugh, jun., conveyed the mortgaged premises, by quit-claim deed, to B., H. and D.; *Held*, that B., H. and D.

could not claim the benefit of the covenants of warranty in the deed from F. and L. to Henry Fitzhugh, jun., so as to contest the plaintiff's mortgages on the ground of usury; but they must be regarded merely as assignees of F. and L., taking the whole beneficial interest in the premises, subject to the payment of the mortgage debt. *ib*

V

VENDOR AND PURCHASER.

1. *Of land.*

1. Where a contract is entered into for the conveyance of land on the payment of the purchase money, the estate vests, in equity, in the vendee, and the vendor retains the legal title as a mere lien or security for the unpaid purchase money. *Moore v. Burrows*, 173
2. Upon the decease of the vendor, his interest in the contract is personal property, and goes to his personal representatives. It will pass by assignment, with or without seal, like a bond and mortgage, and it may be sold as personal property, by his executor or administrator. *Joussou, J. dissented*. *ib*
3. And upon the sale of such a contract, by the administrator of the vendor, the purchaser thereof will have a right to receive the moneys remaining due on the same at the death of the vendor. *ib*
4. An assignment, by the vendee, of such a contract, will convey to the assignee all his interest therein, and entitle the assignee to demand and receive a conveyance from the heirs of the vendor, upon payment of the purchase money due thereon. *Joussou, J. dissented*. *ib*
5. The heirs of the vendor take the title by descent, as a mere security in equity for the payment of the debt. The debt is due to the executor, and the lien is held by the heirs in trust and simply as a pledge or security for its payment. On payment of

the debt, the heirs are compellable, in equity, to execute the trust by a conveyance of the title. *ib*

6. The refusal of a purchaser to complete his purchase, because there is a lease on the premises, will not deprive him of the right to object that there are other incumbrances on the same property. *Morange v. Morris*, 311

7. Such refusal might relieve the vendor from the necessity of tendering performance, on his part, but will not relieve him from the consequences of not being able to give a good title to the premises, at the time agreed on. *ib*

8. If there are incumbrances upon the property, they should be removed before the time fixed for completing the contract. *ib*

9. Where the vendor is unable to perform, performance on the part of the purchaser is not necessary; except in case the purchaser seeks to compel a performance, or to recover damages without rescinding the contract. *ib*

10. If the vendor cannot give a good title, at the time agreed on, the purchaser has a right to refuse to take the property, and to rescind the contract. *ib*

2. Of chattels.

11. Where vendees have been guilty of a fraud, upon a purchase of goods on credit, the vendor may, without waiting until the time of credit has expired, reclaim the goods, or he may waive the tort and recover in assumpsit for the value. *Kayser v. Sichel*, 84

12. In the latter case, it is sufficient for him to allege, in his complaint, that he sold to the defendant goods to the value of so much, and that the defendant has not paid, &c. *ib*

13. If the purchaser of goods, which, by the terms of the contract of sale, are to be delivered and paid for at a specified time, does not tender the price and take the goods within the time agreed upon, the vendor may

request him to pay for and take the goods, and in case of his refusal may abandon and rescind the contract, and dispose of the goods as if no contract had been made; or he may, on due notice to the purchaser, resell the goods as the property of the latter, and recover of him the sum lost by the resale, together with the expenses of keeping the goods. *McEachron v. Randles*, 301

14. This right of the vendor to resell the goods, however, when the contract is not rescinded, and when there is no express stipulation authorizing it, in the contract, can only be exercised after due notice to the purchaser, of the time when and the place where the resale will be made. *ib*

15. When either party to a contract which provides for performance by both parties at the same time and place, before the time for performance arrives, notifies the other that he will not perform, and does not, before the time for performance, recall such notice; or if he puts it out of his power to perform on his part; the other party is relieved from averring or proving performance, or offer to perform. *Crist v. Armour*, 378

16. Thus where, after the making of a contract for the sale and delivery of a quantity of cheese, to be paid for on delivery, the vendor sold the cheese, and delivered a portion thereof to a third party, it was held that this put it out of his power to perform the original agreement; and that the vendee could maintain an action for the breach thereof, without averring or proving performance, or a readiness or offer to perform. *ib*

17. Under such circumstances, the sale to the stranger will be assumed to have been a valid sale; but even if it be shown to be otherwise, the vendor will not be entitled to allege it. *ib*

18. In an action by the vendee, for a breach of such a contract, the plaintiff's right of recovery is not to be limited to the damages sustained upon the portion of the property sold and delivered to the stranger. *ib*

19. So long as any thing remains to be done, to complete a contract of sale, a partial damage to the property, as well as a total damage, is at the risk of the vendor. *Gerard v. Prouty*, 454

20. Thus, where a quantity of cigars were sold at auction, for cash, those loose, in cases, to be weighed, and those in boxes to be counted as full boxes, it was *held* that the vendors must bear the loss occasioned by a rain, occurring before the cigars were weighed or counted. *ib*

21. And when, in an action by the vendor, for the price of the goods, the defendant seeks to recoup for damage done to the property after the sale and before delivery, it is for him to show that the damage occurred between the sale and delivery. *ib*

22. And he must prove the actual damage, without reference to the price paid at auction. It is erroneous to allow him the difference in value between the auction price and the value of the property when delivered. *ib*

23. Where one agrees to sell and deliver a crop of corn, in "merchanta-
ble order," he is bound to deliver sound and ripe corn, and the vendee is not bound to accept any other. *Hamilton v. Ganyard*, 204

24. In every executory contract for the future sale and delivery of articles of merchandise, the law will imply an agreement that the property bargained for shall be of merchantable quality. *ib*

25. Where the defendant, by a written contract, agreed to sell and deliver to S. & M. his crop of corn then growing on about thirty acres of ground, to be delivered "in merchantable order," at a specified price; *Held* that he was bound to deliver all the merchantable corn that grew on the thirty acres, and no more. *ib*

26. And the defendant, claiming the right to deliver the whole crop, although three-fourths of it was conceded to have been of unmerchantable quality, having tendered the good and bad together, without proposing or offering to deliver any, except in that way, *it was held* that

this was not a proper tender or offer of performance; and that the purchasers were not bound to receive the corn tendered in fulfillment of the agreement, but might treat the contract as broken, and bring their action to recover the damages they had sustained. *ib*

27. *Held, further*, that what the plaintiff was entitled to recover, in such action, as damages, was the difference between the contract price and the market value of the merchantable corn growing on that piece of ground, at the time it should have been delivered, together with the amount advanced, on the contract, and interest thereon. *ib*

See ASSIGNMENT, 1, 4 to 8.
SPECIFIC PERFORMANCE.
WARRANTY.

W

WAIVER.

See PRACTICE, 8.

WARRANTY.

1. To prevent a recovery for a breach of warranty upon the sale of property, on the ground that the defects existed, and were visible, at the time of the sale, it must be shown that the defects were such as could be discerned by an ordinary observer examining the property with the view of trading for it, and were such as not to require skill to detect them. *Birdseye v. Frost*, 867

2. Where, on the trial of such an action in a justice's court, the question whether the defects complained of were visible at the time of the trade, so as to take them out of the operation of the warranty, is before the justice, and is passed upon by him, his finding is conclusive. *ib*

3. The question whether the defects were visible, and therefore not reached by the warranty, is not one of law merely, but is, *it seems*, a mixed question of law and fact; and is therefore, so far as the fact is involved, within the rule that forbids the reversal of the judgment of a

justice, rendered on conflicting evidence. *ib*

4. Where a general agent, who is authorized and accustomed to make sales for his employers, of the articles in which they are dealing, gives a warranty as to the character of property sold by him, his employers are bound thereby. *Milburn v. Belloni*, 607

5. Even if such agent exceeds his positive authority or instructions, in giving a warranty, upon making a sale, if the purchaser has no information of the fact, he will not be prejudiced. *ib*

6. Where, upon a sale of a quantity of coal dust, the vendors' agent gave a warranty that it had no dust of soft or bituminous coal mixed with it, it was held that, although the purchaser stated that he was purchasing the coal dust for the purpose of making brick, the vendors could not be held liable in an action on the warranty, upon any implied warranty that the article was suitable for the purpose for which it was purchased, or for any thing beyond the express agreement of their agent that it was the dust of hard coal, exclusively. And that the true rule of damages in such action was the difference between the value of the article as it was, and its value as it would have been, had it been what it was represented to be. *ib*

7. A purchaser has no right to proceed without inquiry or examination, and use an article which will damage his business, relying upon a warranty which only goes to the nature or character of the article, and not to the effect of using it, and then hold the vendor responsible for the remote consequences of his own action. *ib*

WILL.

1. Validity.

1. The rule is well settled that it is the character of a limitation at the time it is created, and not the event

as it turns out in fact, which is to determine its validity. *Brown v. Evans*, 594

2. If the estate created is such as by its terms to suspend the ownership of the property for more than two lives in being, it will be void, although in the subsequent history of the estate, or the parties in interest, it may happen that this limit is not exceeded. *ib*

2. Revocation.

3. The intention of a testator to cancel or revoke a clause in his will, however strongly declared, is of no consequence, unless it be carried out by some act amounting, in judgment of law, to an actual cancellation or revocation. *Clark v. Smith*, 140

4. A testator, having an only son, James W. Smith, devised certain real estate to his "son James W. Smith." After the execution of the will he, with a pen, erased from the clauses of the will containing the devise the name "James W. Smith," leaving the word "son" uncanceled. Held that neither the will, nor the devises to James W. Smith, were revoked by the erasures. *ib*

3. Construction in particular cases.

See *Forsyth v. Rathbone*, 388.
Brown v. Evans, 594.

WITNESS.

1. Where promissory notes, payable to a foreign executor as such, are indorsed by him as executor, to himself in his individual capacity, and he sues thereon in his own name, he is not to be deemed the representative of a deceased person, according to the laws of this state, so as to exclude the defendant from being a witness in his own favor. *Buckingham v. Andrews*, 434

2. He cannot sue, here, in a representative capacity, and can only be regarded as the indorsee of the notes. *ib*

See SEALED INSTRUMENTS.

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